Supreme Court, U.S.
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No. 04-402

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY CARL IVES,

Petitioner,

v.

BOBBY BOONE, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was trial counsel for Petitioner laboring under an actual conflict of interest which prevented him from calling a critical defense witness? Was trial counsel otherwise ineffective for calling this witness to establish Petitioner's defense at trial?

Did expert testimony vouching for the overall credibility of the alleged victim render Petitioner's trial fundamentally unfair and deny him due process?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the denial of habeas corpus relief is not reported. *Ives v. Boone*, No. 02-6397 (10th Cir. May 3, amended June 7, 2004). (Appendix A) The order of the United States Court of Appeals for the Tenth Circuit denying Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* is likewise not reported. (Appendix B) The order was issued on June 7, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. section 2253.

The Tenth Circuit's opinion was rendered on May 3, 2004. The Tenth Circuit denied Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* on June 7, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property[] without due process of law... ."

28 U.S.C. section 2254(d)(1)(2) states in pertinent part that habeas relief is not available to a state prisoner unless the

state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE/STATEMENT OF FACTS

Petitioner was convicted in state court (*State v. Ives,* Oklahoma County Case No. CRF-89-4544) of first degree rape and incest. He was sentenced to 40 years on the rape count and 80 years on the incest count. The state court jury acquitted him of a third count, sodomy. On direct appeal to the Oklahoma Court of Criminal Appeals, Mr. Ives' rape conviction was vacated with instructions to dismiss on double jeopardy/double punishment grounds because it duplicated the incest conviction. *Ives v. State,* No. F-90-870 (Okl. Cr. Mar. 11, 1994)(unpublished).

Petitioner sought state post-conviction relief on a number of grounds. The state trial court denied relief, *Ives v. State,* No. CRF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997)(unpublished), and the Court of Criminal Appeals affirmed. *Ives v. State,* No. PC-97-704 (Okl. Cr. Jan. 30, 1998)(unpublished). No evidentiary hearing was conducted.

Mr. Ives filed a petition for writ of habeas corpus. *Ives v. Boone,* W.D. Okl. D.C. CIV-98-363-A. An evidentiary hearing was ultimately held on Petitioner's ineffective assistance of trial counsel claim. Relief on all claims was ultimately denied on October 7, 2002.

The District Court granted Mr. Ives a certificate of appealability on five issues, two of which are raised in this petition for writ of certiorari. On appeal to the United States Court of Appeals for the Tenth Circuit, that court affirmed the district court's denial of habeas relief in an unpublished opinion. *Ives v. Boone,* No. 02-6397 (May 3, 2004 , amended June 7, 2004)(Appendix A). The Tenth Circuit denied Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* on June 7, 2004. (Appendix B)

Mr. Ives has steadfastly maintained his innocence. His alleged daughter, Wendy Ives, claimed that beginning in 1986 – and perhaps even 1985 – she was sexually abused and subjected to sexual intercourse by Petitioner approximately five to ten times per month. The abuse allegedly ended in 1989. No specific date or dates were ever given for these literally hundreds of claimed acts of abuse. No physical evidence supported her claims.

Wendy Ives had initially accused Petitioner of sexually abusing her in 1987, but recanted those allegations. Wendy Ives had falsely accused another man of raping or sexually molesting her in 1984.

Petitioner, who at one time was married to Wendy's mother, Laura Wilson, lived in a separate residence, was never around Wendy alone after he was falsely accused in 1987, and never had the opportunity to have visited this supposed nightmare of continual abuse on his purported daughter. Wendy claimed that Petitioner would climb on top of her to have sexual intercourse, but due to a gunshot wound to his arm, this was a physical impossibility during a significant period of time covered by the accusations. During the time of the false 1987 allegations and continuing for the next two years, Wendy

denied to her mother that Mr. Ives had been sexually inappropriate with her in any way.

Wendy Ives was an extremely disturbed youngster whose behavioral problems began at an early age. She was manipulative, dishonest, defiant of all authority, and had a host of severe mental impairments. She had been expelled from school for behavioral problems and drug use.

Wendy admitted in both juvenile court proceedings which alleged she was a deprived child due to Petitioner's alleged acts of abuse and Petitioner's criminal trial that she had a motive to fabricate her accusations due to a litany of grievances she held against Mr. Ives, none of which related to sexual abuse. She did not like the rules Petitioner imposed when he was in her presence, and she found him too strict. Wendy resented Mr. Ives, argued with him, and thought she would have an easier time with him "out of the way" so she could push her mother around. She was resentful because Petitioner, who was supposedly her father, did not enter her life until she was 13 years old.

To buttress Wendy's uncorroborated – and largely physically impossible – accusations, the prosecution relied on supposed "expert" witnesses who did not hesitate to vouch for her credibility, labeling her "sincere" and "believable". One, a Dr. Calenzani, even flatly declared to the jury that Wendy was the victim of incest.

Mr. Ives testified and denied all the charges, as he has from the beginning and continues to do to this day. Unfortunately for him, the one witness who could testify in detail that Wendy's accusations were false was not called at trial. This witness was Petitioner's then wife, Laura Wilson. Laura had testified at length at an earlier juvenile court trial

where it was alleged that because of Petitioner's sexual abuse, Wendy was a deprived child. The juvenile proceedings preceded the criminal charges against Mr. Ives. Laura Wilson was jettisoned as a trial witness at the eleventh hour, despite the fact the jury was told repeatedly by trial counsel that she would testify, and even though Mr. Ives had been assured up to the last minute by his lawyer that she would be called. No valid strategic reason was behind the decision not to call Ms. Wilson. Rather, defense counsel kept her off the stand because he had an actual conflict of interest: Laura Wilson was the client of his law partner, and her interests, by the time of trial, diverged from Petitioner's.

REASONS FOR GRANTING THE WRIT

Petitioner was denied his Sixth and Fourteenth Amendment rights to conflict free counsel and effective assistance of counsel. The ruling of the state court, as supported by the Tenth Circuit was contrary to, or an unreasonable application of, the precedent of this Court. 28 U.S.C. section 2254(d)(1).

Mr. Ives was denied his Fourteenth Amendment due process rights to a fair trial. Expert testimony improperly vouched for the credibility of the victim. Where the alleged victim was the key witness at trial, the admission of this critical "corroborating" evidence rendered the trial fundamentally unfair. The ruling of the state court, as affirmed by the Tenth Circuit, was contrary to, or an unreasonable application of previous decisions of this Court affirming the due process right to a fair trial.

ARGUMENT
I.

PETITIONER'S TRIAL COUNSEL, DUE TO AN ACTUAL CONFLICT OF INTEREST, ABANDONED A LEGITIMATE DEFENSE STRATEGY. EVEN ABSENT A CONFLICT OF INTEREST, TRIAL COUNSEL WAS INEFFECTIVE.

Laura Wilson, Petitioner's wife, was a critical defense witness. Ms. Wilson testified at the deprived child hearing, and contradicted the victim's account of abuse. Ms. Wilson testified Mr. Ives could not have assaulted her daughter Wendy with the frequency she described, since Petitioner maintained a separate home and did not want to be near Wendy after she falsely accused him of molesting her in 1987. These 1987 allegations were later recanted by Wendy Ives. Mr. Ives had physical difficulties from a gunshot wound during the relevant time that made it difficult if not impossible for him to assaulted Wendy in the manner she described. Ms. Wilson described her daughter as resentful of Petitioner for reasons other than the claimed assaults. She was frequently dishonest and manipulative, and had suffered significant emotional problems since early childhood. For a period of years, the victim denied the charges she had leveled at Mr. Ives. Ms. Wilson stated that there was an absence of physical evidence to support the charges. For example, she never noticed suspicious stains on her daughter's clothing. Ms. Wilson did not believe the charges, and refuted them in her testimony at the juvenile court proceeding.

Ms. Wilson was not called as a defense witness at trial -- even though counsel assured the jury in voir dire and opening statement that she would be a witness. Although unconvincingly denied, trial counsel labored under a conflict of

interest. His law partner represented Laura Wilson in the ongoing deprived child proceedings. One of the reasons counsel was hired to represent Mr. Ives was that he was told by trial counsel that it would be advantageous to the defense to have him represent Mr. Ives because Ms. Wilson was represented by a lawyer in the same firm. This arrangement of "cooperation" apparently soured when Laura decided she did not believe Mr. Ives anymore and cut off contact with trial counsel.

Laura Wilson was not called as a trial witness, to Mr. Ives' prejudice, because trial counsel represented actual conflicting interests and this conflict led him to leave her off the witness stand. Calling her as a defense witness might imperil her case in the deprived child action, a case where she was represented by trial counsel's partner.

The Tenth Circuit credited testimony from the evidentiary hearing from trial counsel and his then partner that: 1) calling Laura Ives would not have affected her child custody action, and she was not subject to criminal charges, so, therefore, trial counsel was not protecting her to his own client's detriment; and 2) that counsel made a reasoned strategic decision to leave Laura Wilson off the stand when her attitude turned against Petitioner. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, amended June 7, 2004, slip. op. at 8-11)

The record says much more than that. The record of the evidentiary hearing in the federal district court is replete with testimony to the effect that Laura Wilson's *continued support* of Mr. Ives would adversely affect her chances of regaining custody of her daughter from the state. This testimony contradicts the factual scenario presented by the Tenth Circuit. Since Ms. Wilson's continued support of Mr. Ives would or could impact negatively on her case, and she evidently "turned"

for this reason, trial counsel and his partner were representing direct conflicting interests by the time of Mr. Ives' criminal trial. The Tenth Circuit's finding that counsel was not saddled with conflicting loyalties is predicated on the "fact" that, had trial counsel actually called Laura Wilson as a witness, there would be no conflict because *she did not support her husband any longer and would give testimony adverse to his interests, not hers. Id.*

The Tenth Circuit has it backwards. The fact that Laura Wilson evidently changed her mind and was no longer supporting Petitioner is the quintessence of conflict, where each were represented by members of the same firm, and where each client's interests had diverged at the time of Petitioner's criminal trial. Although Laura Wilson turning against her husband and attempting to recant at Petitioner's criminal trial may have eased her problems in the juvenile proceeding, this position was in direct conflict with Petitioner's interests, which was to have Laura Wilson repeat at his criminal trial her earlier sworn testimony repudiating her daughter's accusations. If Laura Wilson's interests at the time of Mr. Ives' criminal trial were truly adverse to his, then two lawyers in the same firm were representing clients with diametrically opposed interests, an obvious conflict.

The Tenth Circuit overlooks another fact: testimony at Petitioner's trial by Laura Wilson recanting her earlier, under oath testimony debunking the accusations of her daughter would have subjected her to a possible perjury charge. 21 Okla. Stat. section 496 (diametrically opposed testimony on material matters constitutes perjury). Contrary to the analysis of the Tenth Circuit, Laura Ives' penal and other interests would have been adversely affected had she given trial testimony which was consistent with her earlier testimony exonerating her husband.

The conflict in this case could not be more apparent or actual. *Wood v. Georgia,* 450 U.S. 261, 271 (1981). Lawyers from the same firm represented two parties with divergent interests simultaneously. The existence of divergent interests between Petitioner and Laura Wilson explains in large part why Wilson would alter earlier testimony she gave under oath -- to protect herself. Mr. Ives' trial counsel believed he could not call Ms. Wilson because of her adverse interest, as his testimony at the evidentiary hearing demonstrated. Because Wilson no longer supported Petitioner, counsel believed she would not longer give testimony favorable to him. For the Tenth Circuit to claim that Ms. Wilson's future legal interests had nothing to do with keeping her off the stand is to ignore reality, and pertinent portions of the record.

Because Mr. Ives was denied his Sixth and Fourteenth Amendment rights to conflict free counsel, and a conflicting legal interest affected a change of stories by a key defense witness, a conflict which drove counsel's decision not to call Laura Wilson, Mr. Ives this Court should grant *certiorari* and Petitioner is entitled to habeas relief. There was an actual conflict of interest which prejudiced Petitioner and adversely affected his representation. Due to the conflict, a legitimate line of defense was abandoned. *Mickens v. Taylor,* 122 S.Ct. 1237, 1243-44 (2002); *United States v. Cronic,* 466 U.S. 648 (1984); *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). The state court ruling, as supported by the Tenth Circuit, was contrary to or an unreasonable application of this Court's decisions. 28 U.S.C. section 2254(d)(1).

Even aside from the conflict of interest issue, *certiorari* should be granted because trial counsel was ineffective under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to call Laura Wilson as a witness. The Tenth

Circuit found the failure to call Wilson was a reasonable strategy because she had changed her view of Petitioner and was no longer supporting him. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, amended June 7, 2004, slip. op. at 10-14)(unpublished). Overlooked by the Tenth Circuit was trial counsel's testimony at the evidentiary hearing that even if Ms. Wilson had switched sides and was hostile to Petitioner at the time of his trial, it still would have been a legitimate strategy to call her as a witness. Trial counsel also acknowledged that based on her previous testimony, Laura Wilson refuted the charges against Petitioner. Despite her changed attitude, Wilson was already on record under oath; any change in her account could have been powerfully impeached by her earlier testimony. Moreover, the motive for any change in testimony was obvious: as long as she supported her husband, her chances of regaining custody of her daughter decreased or would have been eliminated altogether, as even trial counsel and his partner admitted at the evidentiary hearing. This motive for changing course could have been pointed out to the jury as a means of convincing them that Wilson's earlier account was the truthful one and that Wendy Ives' unsupported story was false, according to sworn testimony that had been given by her own mother.

Changed attitude or not, trial counsel's decision not to call Laura Wilson was not a sound trial strategy.[1] Based on her

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[1] Testimony from Petitioner and others at the evidentiary hearing calls into question the Tenth Circuit's conclusion that trial counsel's decision not to call Laura Wilson was a considered trial strategy. It appears to have been made on the spur of the moment, and without consultation with Petitioner. Petitioner testified at the evidentiary hearing that in light of his prior convictions, the only reason he decided to testify was

previous testimony exonerating Mr. Ives, it was professionally unreasonable to leave her off the witness stand. Wendy Ives accusations against Petitioner -- except for improper expert testimony (see below) -- were unsupported by any corroborating evidence. She had earlier recanted similar accusations. No physical evidence supported her claims. She had a history of emotional problems. She resented Mr. Ives for reasons unconnected to her allegations o f a buse. The case came down to a swearing match between the alleged victim and Petitioner. Petitioner's credibility was subject to attack because he had previous felony convictions. In the context of a weak prosecution case, it was simply professionally unreasonable not to call the one witness who could refute, whether through impeachment or not, and who earlier had refuted, Wendy Ives' claims.

Because the prosecution case was weak, relying almost exclusively on the accusatory testimony of a troubled young girl, there is a reasonable probability that had Laura Wilson been called as a witness, the outcome would have been different. This Court has not hesitated to grant relief where counsel, without a legitimate strategy, fails to produce important and available evidence which could have made a difference in the outcome. *E.g., Wiggins v. Smith,* 539 U.S. 510 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000). The same should hold true for Petitioner. The state court's decision

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because trial counsel assured him Laura Wilson would be called as a witness. Trial counsel told the jury she would be called. Petitioner's family, as well as an expert witness retained by the defense, testified at the evidentiary hearing that up until the last moment, they expected Laura Wilson to be a witness. None of this testimony is mentioned in the Tenth Circuit opinion.

to the contrary, as affirmed by the Tenth Circuit, failed to correctly apply Supreme Court holdings addressing the test for ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 684 (1984); 28 U.S.C. section 2254(d)(1).

II.
PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY "EXPERT" TESTIMONY VOUCHING FOR THE ALLEGED VICTIM'S CREDIBILITY.

The lower courts have ruled consistently that testimony from expert witnesses vouching for the credibility of victim/witnesses, particularly in sexual assault or abuse cases, is improper and can deny the Fifth Amendment or Fourteenth Amendment due process right to a fair trial. *E.g., United States v. Charley,* 189 F.3d 1251, 1264, 1267, 1270 (10th Cir. 1999); *Snowden v. Singleterry,* 135 F.3d 732, 738 (11th Cir. 1998); *United States v. Shay,* 57 F.3d 126, 131 (1st Cir. 1995); *Mauer v. Minnesota Department of Corrections,* 32 F.3d 1286, 1290-91 (8th Cir. 1994); *United States v. Whitted,* 11 F.3d 782, 785-86, 787 (8th Cir. 1993). Because expert testimony of this type is inadmissible, it obviously cannot pass muster under this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) for the admissibility of expert testimony. Various opinions from this Court make it clear that the accused in a criminal case has a due process right to a fair trial, a right that can be denied, for example, by improperly admitted testimony. *E.g., Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *Bruton v. United States,* 391 U.S. 123, 131 n. 6 (1968); *Spears v. Mullin,* 343 F.3d 1215, 1226-30 (10th Cir. 2003)(vacating death sentence on due process grounds due to improper admission of unfairly prejudicial evidence).

The Tenth Circuit held that the expert testimony of prosecution witnesses Drs. Worley and Calenzani did not

"vouch" for the overall credibility of the alleged victim's accusations because any such testimony given by these witnesses went largely to the "sincerity" of Wendy Ives' alleged previous suicide attempts, not her testimony as a whole. The Tenth Circuit also concluded that any improper opinion testimony from these witnesses was invited on cross examination. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, slip op. at 15-19, amended June 7, 2004)(unpublished).

The Tenth Circuit was wrong on both counts. The experts gave testimony generally vouching for the accuser's testimony as a whole. The testimony was not invited. The fact counsel tested on cross-examination the validity of the opinions arrived at by the expert witnesses does not "invite" incompetent and groundless "expert" testimony.

On cross-examination, Dr. Worley was asked if she relied on truthful, accurate information in making a diagnosis. She stated she relied on her patients. When the question was repeated, Worley stated that she could diagnose a patient based on what she was told, but could not attest to its accuracy. When asked a general question if a diagnosis would be valid if based on inaccurate information, Worley reversed field, declaring: "[i]n my experience I have -- in my experience you can tell when somebody is telling the truth. In my medical opinion, she was sincere when I saw her." This goes far beyond an opinion regarding the "sincerity" of a suicide attempt. Worley examined the alleged victim in connection with her allegations of sexual abuse, not merely with respect to any suicide attempts. This general vouching testimony was not invited by counsel's question, since he merely asked the witness if a diagnosis would be invalid if based on inaccurate information.

The same is even more true of Dr. Calenzani's testimony. He vouched for the credibility of the accuser's charges as a whole. When asked on cross-examination if he agreed with a defense expert that Wendy Ives suffered from disordered thinking and was not in good contact with reality, Dr. Calenzani went beyond what called for a yes or no answer to opine: "I think she was in full contact with reality. I think that all of the information she gave me there was a reason it was given. It was a time of enormous turmoil and I fully believe her. That is why I believe." Calenzani told the jury the alleged victim "never lost control" of reality, "accurately related" the things she observed, and that her recantation of previous, similar accusations against Petitioner stemmed not from the fact that she was fabricating, but was motivated by a desire to "protect a parent." Unmentioned in the Tenth Circuit opinion is that Dr. Calenzani told the jury outright Mr. Ives was guilty. He told the jury: "Wendy is the victim of incest."

The vouching testimony of these witnesses not only violated due process and failed to pass muster under *Daubert*. It also runs afoul of this Court's decision in *Tome v. United States*, 513 U.S. 150 (1993). In *Tome*, this Court criticized the use of expert witnesses to in effect relate hearsay statements from their patients, particularly where, as here, the patient or third party has a reason to fabricate. The experts in this case went beyond relating hearsay statements to putting a seal of approval on the truth of the accusations.

This vouching testimony, not accurately described by the Tenth Circuit, rendered Mr. Ives trial fundamentally unfair in violation of due process. *Brecht v. Abramson*, 507 U.S. 619 (1993). The state's case for conviction rested on Wendy Ives testimony. There was no independent corroboration, no physical evidence, and due to her history of past recanted accusations and numerous other factors, the alleged victim was

subject to impeachment. The improper expert testimony in this case lent critical, indispensable support to the shaky credibility of the accusing witness, and could very well have turned the *tide for conviction, transforming a swearing match into a case* where the credibility of the accuser was supported by the authoritative pronouncements of "experts." Accordingly, this Court should grant *certiorari*. The state court decision approved by the Tenth Circuit was contrary to or an unreasonable application of Supreme Court precedent enforcing the due process right to a fair trial. *E.g., Williams v. Taylor,* 529 U.S. 362 (2000); 28 U.S.C. section 2254(d)(1).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests this Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LARRY CARL IVES,

Petitioner-Appellant,

v.

BOBBY BOONE,

Respondent-Appellee.

No. 02-6397
(W.D. Okla)
(D.Ct.No.98-CV-363-A)

FILED: MAY 3, 2004

ORDER AND JUDGMENT*

Before **TACHA,** Chief Judge, SEYMOUR, Circuit Judge, and BRORBY, Senior Circuit Judge.

Larry Carl Ives, an Oklahoma state prisoner convicted of incest, appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court granted a certificate of appealability with respect to all of the issues Mr. Ives raises. Exercising jurisdiction under 28 U.S.C. § 2253(c)(1)(A) and 28 U.S.C. § 1291, we affirm.

* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

I. Facts and Prior Proceedings

In 1990, an Oklahoma state court tried Mr. Ives for rape, incest, and oral sodomy against his minor daughter. The victim testified Mr. Ives sexually abused her multiple times between 1986 and 1989. A jury convicted Mr. Ives of the rape and incest charges, but acquitted him of the forcible sodomy charge. At the jury's recommendation, the trial court subsequently sentenced Mr. Ives to forty years and eighty years imprisonment for the rape and incest charges, respectively. The court instructed the sentences would run concurrently.

Following his sentencing, Mr. Ives, with the assistance of new counsel, filed a direct appeal in the Oklahoma Court of Criminal Appeals, raising nine propositions of error. Mr. Ives also filed a "Supplemental Pro Se Brief of Appellant," alleging additional propositions of error. However, the Court of Criminal Appeals found the supplemental brief improperly filed, and ruled the issues raised therein waived on appeal. After considering the issues Mr. Ives properly raised, the Court of Criminal Appeals reversed his rape conviction on double jeopardy grounds, but denied relief on his incest conviction.

Mr. Ives then filed an application for post-conviction relief in the Oklahoma County District Court, alleging nine claims of relief. The district court rejected eight of the nine claims because they "could have been raised on direct appeal." Additionally, the district court found no evidence to support Mr. Ives' ninth claim, an ineffective assistance of appellate counsel claim, and accordingly denied Mr. Ives' claim for post conviction relief. The Oklahoma Court of Criminal Appeals affirmed the decision.

Pursuant to 28 U.S.C. § 2254, Mr. Ives next filed a habeas corpus petition in federal district court, asserting: (1) trial counsel was ineffective; (2) appellate counsel was ineffective; (3) his trial violated double jeopardy because he previously participated in a trial in the Juvenile Division of the Oklahoma County District Court; (4) the Oklahoma court erroneously enhanced his sentence based on two prior felony convictions; (5) the prosecution withheld exculpatory evidence and utilized witnesses who unlawfully vouched for the truthfulness of the alleged victim; (6) prosecutorial misconduct deprived him of a fair trial; (7) the trial court gave the jury faulty instruction; and (8) Oklahoma courts improperly denied him the opportunity to support claims in his application for post-conviction relief.

The federal district court, adopting the review and recommendation of a magistrate judge, initially denied relief on all but four issues. The district court ordered further briefing on:

> (1) whether the trial court improperly allowed expert testimony vouching for the truthfulness of the victim's testimony; (2) whether [Mr. Ives'] trial counsel was constitutionally ineffective for failing to call [Mr. Ives' ex-wife] as a defense witness; (3) whether [Mr. Ives'] trial counsel labored under a conflict of interest that adversely affected his performance; and (4) whether an evidentiary hearing [was] required regarding the conflict of interest issue.

Based on the additional briefing, the district court denied relief on Mr. Ives' claim that expert witnesses had improperly vouched for the credibility of the victim and returned the case to the magistrate judge for an evidentiary hearing on the ineffective assistance of trial counsel issues. Nine witnesses testified at the hearing. After weighing the

evidence presented, the magistrate judge was not convinced Mr. Ives' trial counsel was ineffective and recommended the district court deny Mr. Ives' petition. The district court agreed.

Unsatisfied with the district court's decision, Mr. Ives requested the district court grant a certificate of appealability so he could appeal its decision. The district court granted a certificate of appealability with respect to five issues:

> (1) ineffective assistance of trial counsel due to a conflict of interest and failure to call [Mr. Ives' ex-wife] as a defense witness; (2) improper admission of testimony vouching for the victim's truthfulness; (3) unconstitutional suppression of exculpatory evidence; (4) ineffective assistance of appellate counsel for failure to raise certain issue on direct appeal; and (5) [the Oklahoma courts'] procedural bar [of certain issues].

II. Discussion

Mr. Ives now raises five issues on appeal from the district court's denial of his habeas petition: (1) ineffective assistance of trial counsel; (2) improper testimony by witnesses in vouching for the credibility of the victim; (3) improper suppression of exculpatory evidence by the prosecution; (4) improper procedural bar of a number of claims by the state courts; and (5) ineffective assistance of appellate counsel.

We review the district court's legal conclusions de novo and its factual findings for clear error. *Hill v. Reynolds*, 942 F.2d 1494, 1495 (10th Cir. 1991). With respect to issues adjudicated on the merits in the state courts, 28 U.S.C. §

2254(d) mandates we not grant the application for a writ of habeas corpus unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

If an issue was defaulted in state court on an "independent and adequate" state procedural ground, we will not address it unless Mr. Ives can establish "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

A. Ineffective Assistance of Trial Counsel

Mr. Ives first argues the district court erred in denying his ineffective assistance of trial counsel claim. Specifically, Mr. Ives alleges his trial counsel labored under an actual conflict of interest, which resulted in ineffective assistance. Additionally, Mr. Ives argues his counsel's performance, in itself, was constitutionally deficient.

Mr. Ives contends that because of a conflict of interest, his counsel chose not to call Mr. Ives' ex-wife (the mother of the victim) as a defense witness even through she had testified favorably for Mr. Ives in a prior juvenile court proceeding involving parental rights over the victim.

Specifically, Mr. Ives alleges his counsel chose not to call the witness as trial in order to protect the business interests of counsel's alleged partner, who represented the ex-wife in the same juvenile court proceeding.

Prior to the criminal proceedings against Mr. Ives, both Mr. Ives and his ex-wife were involved in a juvenile court proceeding to determine whether their daughter was a deprived child. The juvenile court proceeding was initiated upon reports Mr. Ives sexually abused his daughter and his wife permitted the abuse. During the juvenile proceeding, the ex-wife testified she believed her daughter was lying about the alleged sexual abuse. Ultimately, the jury found the child was deprived. As a result, the Department of Human Services mandated the ex-wife complete a service plan is she wished to retain her parental rights.

Because the ex-wife's parental rights were still subject to the approval of the Department of Human Services at the time of his criminal trial, Mr. Ives argues his counsel did not call her as a witness so she could avoid any conflict with the Department of Human Services. Mr. Ives hypothesizes her testimony would have adversely affected her efforts to retain custody of their daughter because testimony stating she did not believe her daughter's accusations would have convinced the Department of Human Services she could not look after her daughter's interests and well-being.

Because claims of ineffective assistance of counsel primarily involve consideration of legal principles, they are subject to de novo review. *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998). However, we review factual findings made by the district court in its determination of ineffectiveness claims only for clear error. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). To succeed in an ineffective assistance of counsel claim, a defendant usually

must establish his or her counsel was constitutionally deficient and the deficiency was prejudicial. *Id.* at 687. However, in the context of a conflict of interest claim where, as here, the defendant did not object at trial, the defendant must demonstrate "'an actual conflict of interest adversely affected his lawyer's performance.'" United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). Only if a petitioner establishes an actual conflict affecting representation, will we presume prejudice. *Cuyler*, 446 U.S. at 350. Therefore, in this case, Mr. Ives must establish he and his ex-wife had adverse or inconsistent interests in the criminal case and his counsel was advancing her interest detrimentally to him.

A magistrate judge conducted an evidentiary hearing on this issue. During the hearing, Mr. Ives did not present evidence supporting his allegation his ex-wife had interests that were adverse or inconsistent with his interests in this case. Although Mr. Ives now argues her testimony may have adversely affected her child custody rights, there is no evidence in the evidentiary hearing transcript to support his assertion. Further, there was testimony Mr. Ives' ex-wife did not face potential criminal charges concerning the abuse. Consequently, her interests were not contrary to Mr. Ives' interests in that regard. Additionally, as discussed later, the government presented testimony Mr. Ives' ex-wife no longer supported or believed Mr. Ives with respect to the child abuse allegations. Because such testimony would not have adversely affected his ex-wife's chances to regain custody of her daughter, she would have had no conflict in testifying at Mr. Ives' trial. Mr. Ives also failed to present any evidence suggesting his trial counsel's decision not to call Mr. Ives' ex-wife at trial was influenced by any attempt to benefit the ex-wife at Mr. Ives' expense. Because there is no evidence Mr. Ives' ex-wife had interests contrary to Mr. Ives' interests, and there is no evidence Mr. Ives' trial counsel

acted on any divergent interests, we hold the district court was correct in concluding Mr. Ives failed to establish his counsel operated under an actual conflict of interest.

We now turn to Mr. Ives' general ineffective assistance of trial counsel claim. Mr. Ives argues that even if his trial counsel was not operating under an actual conflict of interest, counsel nevertheless was ineffective in failing to call Mr. Ives' ex-wife as a witness. We reject this argument.

As previously noted, to establish ineffective assistance of counsel, Mr. Ives must show his counsel's performance was constitutionally deficient and Mr. Ives was prejudiced by the deficiency. *Strickland*, 466 U.S. at 694. To prove his counsel's performance was constitutionally deficient, Mr. Ives must demonstrate his counsel "committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness." Foster v. Ward, 182 F.3d 1177, 1184 (10th Cir. 1999) (quotation marks and citations omitted), *cert. denied*, 529 U.S. 1027 (2000).

At the evidentiary hearing, Mr. Ives' trial counsel explained his reason for not calling Mr. Ives' ex-wife to the stand. According to counsel, the ex-wife, although initially supportive of Mr. Ives, ceased all communication with Mr. Ives' counsel in the weeks before trial. Her counsel informed Mr. Ives' counsel she no longer supported or believed Mr. Ives with respect to the child abuse allegations. Because of this change in attitude, Mr. Ives' counsel testified he believed the ex-wife would be a dangerous witness and any aid she could have provided in undermining the victim's credibility would have been outweighed by her lack of support and probable hostility toward Mr. Ives on the stand.

Mr. Ives argues his trial counsel's "hearing testimony should not be considered at all, or [should be] taken with a very large grain of salt" because counsel "remained in the courtroom during the testimony of other witnesses, and even discussed his testimony and the proposed testimony of [Mr. Ives' ex-wife] with her in the courthouse hallway." Mr. Ives believes this conduct violated a sequestration order. Consistent with Federal Rule of Evidence 615, the magistrate judge instructed "any witness who is present and will not be testifying first will need to remain outside the presence of the Court." The magistrate judge further instructed the witnesses "not to discuss [their] testimony with anybody other than the attorneys in the case." Mr. Ives believes his state court trial counsel violated both portions of the sequestration order.

Mr. Ives did not, however, raise the concerns he had with his trial counsel's presence or out-of-court conversations during the evidentiary hearing itself. Only after receiving the magistrate judge's report and recommendation did Mr. Ives ask the district court to strike his trial counsel's testimony. The district court concluded counsel had not violated the sequestration order. The district court further concluded that even if the counsel violated the sequestration order, Mr. Ives was not entitled to relief because he did not show he was prejudiced by the violation.

Assuming, without deciding, trial counsel's conduct violated the sequestration order, we conclude Mr. Ives is not entitled to relief. When a witness violates a sequestration order, it is within the trial court's discretion to admit or exclude the witness' testimony. *United States v. McVeigh*, 106 F.3d 325, 330 n.3 (1997) (citing *Burks v. Okla. Publ'g Co.*, 81 F.3d 975, 980 (10th Cir. 1996)). The witness should generally not be disqualified unless allowing the testimony would result in "probable prejudice." Okla. Publ'g, 81 F.3d at 980 & n.2 (citing *Holder v. United States*, 150 U.S. 91, 92

(1893)). *See also United States v. Klinginsmith*, 25 F.3d 1507, 1511 (10th Cir. 1994). Mr. Ives suggests he was prejudiced because, after speaking with Mr. Ives' ex-wife, counsel testified the conversation reinforced his decision not to call her during the trial. We disagree. In this case, the magistrate judge knew Mr. Ives' trial counsel remained in the courtroom during other witnesses' testimony. Further, it is evident from counsel's testimony that he had spoken with Mr. Ives' ex-wife. Because both these facts were apparent to the magistrate judge, the judge could consider them in making credibility determinations and issuing findings. Under these circumstances, we will not strike Mr. Ives' trial counsel's testimony from the record.

After reviewing the hearing transcript, we, like the district court, conclude Mr. Ives' ex-wife was a "dangerous witness" for Mr. Ives. We therefore conclude counsel's ultimate decision not to call the ex-wife was a reasonable trial strategy. Because counsel's decision was reasonable in light of the circumstances presented, Mr. Ives has not met his burden of establishing counsel's performance was constitutionally deficient. Thus, we do not consider whether counsel's performance was prejudicial.[1]

In sum, having concluded Mr. Ives has not met his burden in establishing ineffective assistance of trial counsel due to a conflict of interest or otherwise, we affirm the district court's decision denying Mr. Ives' ineffective assistance of trial counsel claim.

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[1] Additionally, Mr. Ives argues his trial was ineffective because counsel did not object to vouching testimony by a number of the state's expert and lay witnesses. However, because we conclude later Mr. Ives' vouching argument is without merit, see infra Part B, he cannot succeed on an ineffective assistance claim on these grounds.

B. Improper Witness Vouching

Mr. Ives next contends the Oklahoma state trial court improperly allowed several witnesses to vouch for the victim's credibility. Specifically, Mr. Ives points to statements made by two expert witnesses and two lay witnesses.

Although state court determinations of state law evidentiary matters are generally unreviewable on habeas corpus review, *Martin v. Kaiser*, 907 F.2d 931, 934 (10th Cir. 1990), we will review such determinations where "they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights," *Brinlee v. Crisp*, 608 F.2d 839, 850 (10th Cir. 1979). "Because a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor [we] must tread gingerly and exercise considerable self restraint." *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002) (quotation marks, alterations, and citation omitted), *cert. denied*, 123 S. Ct. 1911 (2003). Reviewing the testimony of the witnesses with these principles in mind, we conclude Mr. Ives' trial was not fundamentally unfair.

1. Expert Witness Testimony

With respect to the expert testimony, Mr. Ives complains testimony of Dr. Linda Worley and Dr. David Calenzani, who both treated the victim at various times, improperly bolstered the credibility of the victim's accusations concerning her father's abuse. Mr. Ives also contends the vouching testimony was improper because it allowed the expert witnesses "to relate hearsay statements" from the victim. Additionally, Mr. Ives believes the "vouching" portions of the experts' testimony do not meet the standard

for scientific reliability established in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Upon review of the record, we conclude any alleged erroneous admissions during cross-examination were invited by defense counsel's questioning and did not render the trial proceedings fundamentally unfair.

Mr. Ives argues portions of Dr. Worley's testimony prevented a faire trial. Mr. Ives' counsel's cross-examination of Dr. Worley proceeded as follows:

> Q: Would it surprise you if you found out that [the victim] is not suicidal and was not suicidal on April 18th, 1989?
>
> A: Would it surprise me?
>
> Q: Yes.
>
> A: I don't know how I would find that out, because I felt like she was. She was writing notes to her teacher.
>
> Q: If you knew that she had testified in this courtroom earlier today that she was not suicidal and never intended to take her life, would you be surprised?
>
> A: I don't know. I think that sometimes people change their stories when they find out what the consequences of saying they're suicidal are. Sometimes they say –
>
> Q: In other words, again I'm not trying to put words in your mouth, you believe more of what she said on March 18th than what she might have said in the courtroom today? April 18th, excuse me.
>
> A: I don't think that's the issue here. I mean –

Q: In making your diagnosis, Doctor, you rely on truthful information, don't you, accurate information.

A: Well, I rely on my interview with the patient.

Q: And you rely on accurate information. If you don't get accurate information you can't make a valid diagnosis, can you?

A: I can make a diagnosis by what information I get. I cannot say whether it's accurate or not.

Q: I understand that, but my point is, if somebody comes in, again, for whatever reason they may have, and tells you a bunch of inaccurate information and you maker a diagnosis, that diagnosis may not be valid in reality.

A: In my experience I have – in my experience you can tell when somebody is not telling the truth. In my medical opinion, she was sincere when I saw her.

Immediately following this exchange, Mr. Ives' counsel moved for a mistrial. The trial court denied the request, concluding counsel had invited the error though his line of questioning. Now Mr. Ives argues this testimony impermissibly sustained the victim's credibility.

Mr. Ives similarly argues Dr. Calenzani also improperly vouched for the victim's credibility. Mr. Ives' counsel's cross-examination of Dr. Calenzani proceeded as follows:

Q: But when it comes right down to it, only they know whether they are in fact suicidal; is that right?

A: No.

Q: You wouldn't agree with that?

A: I think that – you see, there is where we need to make a psychiatric assessment. And the psychiatric assessment is a valid assessment that will come to the conclusion if you are suicidal or not. I think that – that is what I base my work on.

Q: So a psychiatric evaluation is based upon the data you have?

A: Yes.

Q: And the only data you have along with your experience and training?

A: Sure.

Q: Would you agree with Dr. Green's conclusion that there is evidence of disordered thinking, perceptual distortion and non-conventional attitudes, all of which suggests that [the victim] is not in good contact with reality?

A: I think that [the victim] was in full contact with reality. I think that all the information that she gave me there was a reason it was given. It was a time of enormous turmoil and I fully believe her. That is why I believe.

Mr. Ives' counsel did not object to this testimony.

Oklahoma courts follow the "well established principle that a defendant may not complain of error which

he has invited, and that reversal cannot be predicated upon such error." *Pierce v. State*, 786 P.2d 1255, 1259 (Okla. Crim. App. 1990). *See also Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984) (holding "an appellant may not complain on appeal of errors which he himself induced or invited"). This invited error doctrine applies when the defendant elicits otherwise inadmissible evidence from a witness during cross-examination. *See Washington v. State*, 989 P.2d 960, 973 (Okla. Crim. App. 1999). We have previously denied habeas relief when a defendant's request for relief is based on an error he invited. *See Parker v. Champion*, 148 F.3d 1219, 1221-22 (10th Cir. 1998), *cert. denied*, 525 U.S. 1151 (1999).

In the exchanges quoted above, both experts responded reasonably to Mr. Ives' counsel's questions. Because Mr. Ives' querying of the doctors on their respective abilities to diagnose patients and on their bases for determining the mental state of their patients instigated the allegedly improper responses, the court's admission of the answers did not affect the fundamental fairness[2] of the trial. Thus, Mr. Ives is not entitled to habeas relief on this ground.

[2] We also note the expert testimony was directed at whether the victim's reports of suicidal thoughts were truthful rather than whether her allegations of sexual abuse were truthful. Further, the trial judge instructed the jury: "You are not required to surrender your own judgment to that of any person testifying as an expert, or to give controlling effect to the opinion of an expert, for the testimony of an expert like that of any other witness is to be received by you and given such weight and value as you deem it is entitled to receive."

2. Lay Witness Testimony

Mr. Ives also argues the improper vouching testimony of two lay witnesses, Robert Tunnell[3] and Martha Roller, deprived him of a fundamentally fair trial. Oklahoma's rule on the admissibility of lay witness testimony corresponds to the federal rule. Both allow a lay witness to testify "in the form of opinions and inferences" so long as the testimony is "(1) [r]ationally based on the perception of the witness; (2) helpful to a clear understanding of thw witness' testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge." Okla. Stat. Ann. Tit. 12, § 2701 (1993 & Supp. 2004); Fed. R Evid. 701. Under this rule "courts have been very liberal in admitting witnesses' testimony as to another's state of mind if the witness has had sufficient opportunity to observe the accused so as to draw a rational conclusion." *United States v. Hoffner*, 777 F.2d 1423, 1425 (10th Cir. 1985).

Keeping those rules in mind, we turn first to Officer Robert Tunnell's testimony. During direct examination, Officer Tunnell, a state witness, testified concerning his interactions with the victim after being called to investigate suspected abuse:

> Q: Officer, during the hours where she was refusing to talk to anybody to confide in them while she was in your presence about what was bothering her, can you tell us if you noticed anything unusual about her mental state then?

---

[3] Although Mr. Ives classifies Mr. Tunnel as an expert witness, in fact, Mr. Tunnell testified as a lay witness, only recounting his time with the victim during her examination by a social worker.

A: She was very agitated, very distraught and made the statement that she was scared.

Q: Scared of what?

A: At that time she didn't make a statement of what she was scared of.

Q: Did she say something about somebody?

A: She made reference to her father.

Q: What reference?

A: At this time

Q: Yes.

A: At this point and time she did not make reference to her father.

Q: You said she made a – with regard to her state of mind and her father at some point that evening while she was in your presence, did she make a statement?

A: During that evening?

Q: Yes, sir.

A: Okay. When we had transported her from Children's to another facility where she would be staying in front of another doctor, she stated that she was afraid of her father and she made the statement in front of me that, "You don't know what he will do. He will go any length to get to me."

> Q: And based on your experience, the number of years that you've been a police officer and the number of people that you've talked to in stress-filled situations, did she appear to be sincere to you when she was speaking of this fear of her father?
>
> A: Very.

Mr. Ives' counsel did not object to this testimony.

In this exchange, Officer Tunnell is testifying to his opinion of the victim's state of mind – fearful- rather than vouching for the credibility of her statements concerning the sexual abuse by her father. Additionally, the testimony is relevant to the issue of Mr. Ives' abuse and helpful in understanding the victim's communications during the investigations of the abuse. This testimony was proper because Officer Tunnell spent several hours with the victim and had ample opportunity to observe her demeanor. Furthermore, if there was any possible error, it is difficult to see how Officer Tunnell's one-word answer deprived Mr. Ives of a fair trial. *See United States v. Chiquito*, 106 F.3d 311, 314-15 (10th Cir.) (holding any possible error arising from lay witness testimony that the victim did not give any indication she was lying was harmless), cert. denied, 520 U.S. 1248 (1997).

We turn now to the testimony of the victim's teacher, Martha Roller, whom the victim confided in regarding the abuse. Specifically, Mr. Ives believes Ms. Roller impermissibly testified the victim "had a 'good' reputation for truth telling, related statements [the victim] had made about the alleged abuse, said she 'believed' the victim, and waited to report the allegation to the authorities until she was 'sure of it.'" Ms. Roller's testimony about why she waited to

report the allegations came in response to cross-examination questioning from Mr. Ives' counsel:

> Q: Did you report [the victim's allegations] to the Department of Human Services?
>
> A: Not at that time.
>
> Q: Did you report it to anybody in school?
>
> A: The counsel – the social worker and the counselors.
>
> Q: Are you aware of the statute that requires teachers or doctors or anybody who comes in contact with children who are making these allegation to report it to the appropriate agencies?
>
> A: I am, but I had to make sure that I knew what I was talking about.
>
> Q: You weren't sure, were you?
>
> A: Well, no when a student just tells you out – at that point. No, not at first.

Like the experts' testimony previously discussed, Ms. Roller's answers were invited by Mr. Ives' counsel's questions. *See Pierce*, 786 P.2d at 1259; *Gundy*, 728 F.2d at 488. Therefore, we conclude Ms. Roller's answers did not affect the fundamental fairness of Mr. Ives' trial. *See Parker*, 148 F.3d at 1221-22.

As to Ms. Roller's other statements Mr. Ives claims tainted his trial, we do not have the portions of the record containing this testimony. However, accepting Mr. Ives'

recitation of testimony as correct, we conclude these minute and isolated statements did not affect the fundamental fairness of Mr. Ives' trial. *See Chiquito*, 106 F.3d 314-15.

Having concluded these witnesses' testimony did not render Mr. Ives' trial fundamentally unfair, we now proceed to Mr. Ives' argument the district court erred in concluding the prosecution withheld exculpatory evidence from Mr. Ives.

C. Improper Suppression of Exculpatory Evidence

Mr. Ives argues he "was denied his Fourteenth Amendment due process rights because the prosecutor suppressed material exculpatory evidence." The allegedly exculpatory evidence consists of (1) a medical report allegedly stating that the victim's hymen was intact in 1987, and (2) a letter received by Child Welfare Services after the trial from a mental health care professional who had examined the victim. We review each document in turn.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). We determine materiality by "whether there is a reasonable probability that the outcome of [the trial] ... would have been different had the State disclosed this information earlier." *Knighton v. Mullin*, 293 F.3d 1165, 1172-73 (10th Cir. 2002), *cert. denied*, 538 U.S. 930 (2003).

The first document identified by Mr. Ives is a medical report prepared following a physical examination of the victim in response to her first claims of abuse against Mr.

Ives in 1987. Mr. Ives argues the report conclusively establishes he could not have had sexual intercourse with the victim prior to 1987 because the report states the victim's hymen was intact at the time of the examination. Thus, Mr. Ives argues the report is exculpatory because it renders impossible the victim's allegations Mr. Ives had sexually abused her from 1986 to 1987 and casts "grave[] doubt" on the victim's other allegations.

Mr. Ives' description of the medical report is inaccurate. Instead of conclusively reporting the victim's hymen was intact, the report simply states the victim's "[h]ymen was thought to be in tact." Further, immediately preceding this uncertain remark, the medical report contains a section entitled "Past Medical History." This section notes the victim was examined in June 1985 and concludes that at that time "her [h]ymen was not intact." The report also states that at the 1987 exam the victim had "red, purple blotchy bruises on her inner thighs." In looking at the information contained in the entire report, the report does little to damage the victim's credibility and does not conclusively establish the victim had not engaged in sexual intercourse prior to the 1987 examination. Consequently, Mr. Ives' *Brady* claim with respect to the medical report is without merit because the report is neither exculpatory nor material.

The second piece of evidence Mr. Ives claims the prosecution wrongfully withheld is a letter written by Dr. Carmen Warren-Chioco after the conclusion of the criminal trial. The letter Dr. Warren-Chioco sent to Child Welfare Services expressed her concern for the victim's "current drug abuse, manipulativeness, oppositional defiance and continuing borderline pathology." Mr. Ives argues the letter is material because it establishes the victim's erratic behavior was not the result of post-traumatic stress disorder caused by sexual abuse, but the result of her oppositional defiance

disorder. Although Mr. Ives concedes the prosecution had no obligation to turn over this letter because it was written after the conclusion of the trial, Mr. Ives believes "because Child Welfare Services was closely involved in the criminal case and the letter was written immediately after the trial, the prosecution had to have known that its own agents, in an ongoing fashion, were aware of [the victim's] numerous, impeaching mental impairments."

After reviewing the entire letter, we, like the magistrate judge and the district court, conclude that nothing in the latter shows the prosecution or its agents had any information about the victim's alleged oppositional defiance disorder prior to or during the trial. Having concluded the prosecution did not withhold exculpatory evidence, we deny Mr. Ives' request for habeas relief based on *Brady v. Maryland*.

D. Procedural Bar

Mr. Ives next argues the federal district court erred in concluding a number of his claims[4] were barred from habeas review. The district court concluded his claims were barred because the Oklahoma Court of Criminal Appeals held the claims were procedurally barred. The Court of Criminal Appeals denied Mr. Ives' petition for post-conviction relief on these claims because Mr. Ives had not raised them on direct appeal. *See Fisher v. State*, 845 P.2d 1272, 1274 (Okla. Crim. App. 1992) ("Matters which have or could have been raised on direct appeal but where not will not be considered in post-conviction proceedings."), *cert denied*, 509 U.S. 911 (1993). Mr. Ives argues we should nevertheless

[4] These claims include a double jeopardy claim, an erroneous sentence enhancement claim, and an improper jury instruction claim.

consider these claims because his appellate counsel was ineffective.

Before we will address claims procedurally barred by "independent and adequate" state grounds, Mr. Ives must demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Mr. Ives argues ineffective assistance of appellate counsel as a cause for his default on direct appeal. Mr. Ives believes his appellate counsel was ineffective for failing to assert the identical claims the state court held were procedurally barred from being asserted in his request for post-conviction relief. In the alternative, Mr. Ives argues our failure to consider these claims would result in a miscarriage of justice because he is innocent and his claims or meritorious.

A petitioner may, as Mr. Ives seeks to do, "establish cause for his procedural default by showing that he received ineffective assistance of counsel in violation of the Sixth Amendment." Bank v. Reynolds, 54 F.3d 1508, 1514 (10th Cir. 1995) To show ineffective assistance of appellate counsel, a petitioner must "establish that appellate counsel was 'objectively unreasonable' in failing to assert [a] claim on direct appeal, and that there is a reasonable probability that, but for counsel's failure to raise the issue, [the petitioner] would have prevailed in challenging his ... conviction[] on direct appeal." *Hain v. Gibson*, 287 F.3d 1224, 1231 (10th Cir. 1002), *cert. denied*, 537 U.S. 1173 (2003). However, counsel "need not and should not raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000). We review the merits of the omitted issues to evaluate

performance of counsel. *Upchurch v. Bruce*, 333 F.3d 1158, 1164-65 (10th Cir.), cert. denied, 124 S. Ct. 839 (2003).

> If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003).

In this case, Mr. Ives argues his appellate counsel was ineffective because he failed to raise three claims: (1) double jeopardy; (2) erroneous use of a foreign conviction for sentence enhancement purposes; and (3) improper jury instructions. In order to determine whether Mr. Ives can show cause for his procedural default via ineffective assistance of appellate counsel, we review the merits of the omitted claims and determine whether counsel was ineffective for failing to appeal these claims.

1. Double Jeopardy

Mr. Ives first argues his appellate counsel was ineffective for failing to argue Mr. Ives' conviction for incest violated the doctrine of collateral estoppel and the Fifth Amendment's protection against double jeopardy. The Double Jeopardy Clause, applied to the states through the Fourteenth Amendment, protects defendants from further

prosecutions after a conviction or acquittal, and from multiple punishments for the same offense. *See* U.S. Const. Amend. V, XIV; *Anderson v. Mullin*, 327 F.3d 1148, 1153 (10th Cir.), cert. denied, 124 S. Ct. 305 (2003). "[T]he Double Jeopardy Clause incorporates the doctrine of collateral estoppel in criminal proceedings." Ichiro v. Farley, 510 U.S. 222, 232 (1994). See also United States v. Gaillardia-Mendez, 150 F.3d 1240, 1242 (10th Cir. 1998). "Collateral estoppel, or, in modern usage, issue preclusion, 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Ichiro*, 510 U.S. at 232 (quoting *Ashes v. Swenson*, 397 U.S. 436, 443 (1970)).

Here, Mr. Ives argues his criminal prosecution and conviction for incest amounts to double jeopardy because he previously participated in a state deprived child hearing concerning the same allegations prompting the criminal prosecution. Under Oklahoma law, a "deprived child" is a child "who does not have the proper parental care or guardianship or whose home is an unfit place for the child by reason of neglect, abuse, cruelty, or depravity on the part of the child's parents, legal guardian, or other person responsible for the child's health or welfare." Okla. Stat. Ann. Tit 10, § 7001-1.3(A)(14)(b) (1998 & Supp. 2004).[5] Prior to Mr. Ives' trial and conviction for incest, the district attorney filed a petition in the Juvenile Division of the Oklahoma County District Court alleging the victim was deprived because Mr. Ives had sexually and emotionally abused her. The juvenile court summoned Mr. Ives to appear

[5] At the time of the deprived child hearing for the victim in this case, the statute did not mention "abuse," but instead said a child was deprived if the "home [was] an unfit place for the child by reason of neglect, cruelty, or depravity." Okla. Stat. Ann. Tit. 10, § 1101(4) (1987).

at the hearing and heard testimony concerning Mr. Ives' alleged sexual abuse of the victim. Ultimately, a jury concluded the victim was "deprived as to the father." Mr. Ives now argues the doctrines of collateral estoppel and double jeopardy protect him from further prosecution and punishment for the abuse alleged in the juvenile proceeding.

We conclude Mr. Ives' argument is without merit because the juvenile proceeding was not criminal in nature. The Supreme Court instructs that "the [Double Jeopardy] Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997). *See also Simpson v. Bouker*, 249 F.3d 1204, 1212 (10th Cir. 2001). "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *Hudson*, 522 U.S. at 99. We employ "a two-part test for determining whether a particular punishment is civil or criminal." *Simpson*, 249 F.3d at 1212. "First, we must determine whether the legislature 'indicated either expressly or impliedly a preference for on label or the other.'" Id. (quoting *Hudson*, 522 U.S. at 99). Second, "[e]ven in those cases where the legislature has indicated an intention to establish a civil penalty, we ... inquire[] further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99. (quotation marks, citations, and alterations omitted.)

Oklahoma courts, in discussing the state legislature's intention, have held deprived child hearings are civil in nature. *See In re H.J.*, 854 P.2d 381, 383 (Okla. App. 1993). *C.f. In re K.W.*, 10 P.3d 244, 245-46 (Okla. Civ. App. 2000) (treating a deprived child hearing as a civil case). According to the Oklahoma Court Of Appeals, the goals of the juvenile court proceeding involving parental rights are "achieving the

correction of parental behavior and protection of...neglected youngsters". *In re H.J.*, 854 P.2d at 383. This holding is consistent with the Oklahoma Statutes which, at the time of the deprived child hearing involving the victim, emphasized "the public policy of [Oklahoma] is to assure adequate and appropriate care and treatment for any child". Okla. Stat. Ann. Tit. 10, § 1129 (1987).[6] Indeed, at the time of the deprived child hearing, Oklahoma law specifically provided that "cases for children shall be heard separately from the trial of cases against adults". Okla. Stat. Ann. Tit. 10 § 1111 (1987).[7] Furthermore, appeals from district court decisions in deprived child hearings are handled by the Oklahoma Court of Civil Appeals rather than the Oklahoma Court of Criminal Appeals. *See e.g., In re J.K.*, 62 P.3d 807 (Okla. Civ. App. 2002); *In re K.W.*, 10 P.3d 244. Based on this, we conclude the Oklahoma legislature intended deprived child hearings to be civil in nature.

Because the statutory scheme allowing for deprived child hearings is civil on its face, we must presume the heating was civil unless Mr. Ives provides "the clearest proof" the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 99. In evaluating whether Mr. Ives has provided this clear proof, we look to several useful guideposts:

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[6] The statute now provides: "The paramount consideration in all proceedings concerning a child alleged or found to be deprived is the health and safety and the best interests of the child." Okla. Stat. Ann. Tit. 10, § 7001-1.2 (1998 & Supp. 2004).

[7] The statute now reads: "All cases of deprived children shall be heard separately from the trial of cases against adults." Okla. Stat. Ann. Tit 10, § 7003-4.1 (1998 & Supp. 2004).

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. at 99-100 (quotation marks and citation omitted). Mr. Ives has not made any specific arguments with respect to these or other potentially relevant factors. Our own review of the statutory scheme convinces us the deprived child hearing was not so punitive in effect as to transform it into a criminal proceeding.

Mr. Ives nevertheless argues that an Oklahoma Court of Criminal Appeals case, *Smith v. State*, 46 P.3d 136 (Okla. Crim. App. 2002), holds "double jeopardy and collateral estoppel may bar a criminal prosecution based on the same allegations raised in a previous deprived child/parental rights termination proceeding." We do not think the reasoning in *Smith* prevents Mr. Ives' criminal prosecution.

In *Smith*, the defendant, Mr. Smith, was first involved in a deprived child proceeding. *Id.* at 138. In that proceeding, the jury found Mr. Smith "had not committed sexual abuse that was heinous or shocking and had not committed sexual abuse that caused severe harm or injury". *Id.* (quotation marks omitted). The state then instituted a criminal proceeding. *Id.* at 137. In the criminal proceeding, a jury convicted Mr. Smith of sexual abuse of a minor. *Id.* On appeal, Mr. Smith argued collateral estoppel prevented

the criminal jury from deciding whether he had committed sexual abuse because the jury in the deprived child hearing concluded he had not committed the abuse. In deciding the issue, The Oklahoma Court of Criminal Appeals noted that '[c]ollateral estoppel may be applicable where the first cause of action was civil and the second was criminal." *Id.* 17 135; see also *Yates v. United States*, 354 U.S. 298, 335-36 (1957); *United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992). The theory is that if the government is unable to meet the lower burden of proof in a civil case, the government would not be able to meet the higher burden of proof in a subsequent criminal case. *See Smith*, 46 P.3d at 138. Under this theory, '[a] specific jury finding on an ultimate issue in favor of the defendant would preclude a subsequent criminal prosecution on the same issue or issues." *Id.* The Oklahoma court, however, determined Mr. Smith was not protected from subsequent prosecution because the language of the jury verdict in the deprived child hearing required sexual abuse that was "heinous or shocking", a more serious accusation than the elements required for criminal sexual abuse of a child. *Id.*

The reasoning of the Smith court is inapplicable here because the deprived child hearing did not result in "[a] specific jury finding on a ultimate issue *in favor* of [Mr. Ives]." *Id.* (emphasis added). In a deprived child hearing, a jury only needs "clear and convincing evidence" on order to find a child is deprived. See *In re C.G.*, 637 P.2d 66, 70-71 (Okla. 1981). In contrast, Mr. Ives' criminal conviction required proof "beyond a reasonable doubt". *See Huskey v. State*, 989 P.2d 1, 5 (Okla. Crim. App. 1999). Therefore, the civil jury's finding that the victim was deprived would not automatically establish Mr. Ives' guilt in the criminal case. The differences in proof standards preclude application of the collateral estoppel doctrine in this case. *See United*

States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984).[8]

Because there is no merit to Mr. Ives' double jeopardy and collateral estoppel claim, his appellate counsel was not ineffective for failing to raise the claim on direct appeal. Therefore, Mr. Ives cannot establish cause for his procedural default of this claim.

Furthermore, our conclusion that Mr. Ives' double jeopardy and collateral estoppel claim is without merit leads us to conclude no miscarriage of justice will result from our decision not to excuse Mr. Ives' procedural default. *See Coleman*, 501 U.S. at 750.

2. Erroneous Sentence Enhancement

Mr. Ives next argues his appellate counsel was ineffective for not appealing the court's use of his prior federal conviction for possessing an unregistered firearm under 26 U.S.C. § 5861 (d) to enhance the requisite minimum for his sentence. Mr. Ives does not dispute the fact he pled guilty to, and was convicted of, "possessing firearms with no serial number and not registered to him, in violation of 26 U.S.C. § 5861 (d)." Instead, Mr. Ives contends the firearms conviction should not lead to enhancement because the "offense – based solely on powers reserved to the federal government – has no analogue in the Oklahoma criminal

[8] Indeed, it unlikely Mr. Ives would have wanted the deprived child hearing to conclusively establish he had abused his daughter for criminal purposes. *See United States v. Killough*, 848 F.2d 1523, 1528 (11th Cir. 1988) (holding that when collateral estoppel prevented re-litigation of an issue in a later proceeding, the finding in the first proceeding conclusively established the issue in the second proceeding).

statutes." Consequently, Mr. Ives believes the court should have sentenced him based on a minimum term of ten years incarceration rather than a minimum term of twenty years incarceration.

At the time the state trial court sentenced Mr. Ives, Oklahoma law required "every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offense within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years." Okla. Stat. Ann. tit. 21, § 51(B) (1983 & Supp. 1990) (current version available at Okla. Stat. Ann. tit. 21, § 51.1(B) (2002)). In contrast, a person convicted of only one previous "offense punishable by imprisonment in the State Penitentiary" was subject to a ten-year minimum sentence if the subsequent offense would normally qualify for a sentence exceeding five years. See Okla. Stat. Ann. tit. 21, § 51(A) (1983 & Supp. 1990) (current version at Okla. Stat. Ann. tit. 21, § 51.1 (2002)).

Oklahoma law further explains what convictions its courts may use for enhancement purposes.

> Every person who has been convicted in any other state, government or country of an offense which, if committed within the state, would be punishable by the laws of this state by imprisonment in the penitentiary, is punishable for any subsequent crime committed within this state...to the same extent as if such first conviction had taken place in a court of this state.

Okla. Stat. Ann. tit. 21, § 54 (2002). When analyzing whether a foreign conviction can be used to enhance a defendant's minimum sentence, Oklahoma courts ask

"whether the allegation in the [foreign] indictment..., and the admitted guilt thereof, constitute a felony, punishable by a term in the penitentiary, under the statutes of Oklahoma." *Tice v. State*, 283 P.2d 872, 876 9Okla. Crim. App. 1955). Because of this emphasis is on the specific charges to which the defendant plead guilty, Oklahoma need not have an offense identical to the foreign statute; it is sufficient if the defendant pled guilty to an indictment describing conduct constituting a felony under Oklahoma law. *See id.* at 876-77.

With this understanding, we now return to Mr. Ives contention that his federal firearm conviction should not have been used to enhance his sentence. Mr. Ives insists that "since 26 U.S.C. section 5861(d) is based solely on powers reserved to the federal government, there is no analogous Oklahoma crime". Mr. Ives' argument fails because, as noted above, Oklahoma requires a court look at the conduct to which Mr. Ives pled guilty in determining whether the conduct was a crime under Oklahoma law rather than spend time comparing the federal statute to various Oklahoma laws. *See Tice*, 283 P.2d at 876-77. Under this rubric, Oklahoma courts have held federal convictions may enhance the punishment for subsequent crimes even when the prior federal conviction was under a statute based on powers reserved to the federal government. *See, e.g., Webb v. State*, 732 P.2d 478, 480 (1987) (holding federal conviction for making a false statement to obtain a weapon, 18 U.S.C. § 922(a)(6), could be used to enhance sentence for subsequent conviction); *Lee v. State*, 576 P.2d 770, 771-72 (Okla. Crim. App. 1978) (holding federal conviction for interstate transportation of a stolen motor vehicle, 18 U.S.C. § 2312, could be used to enhance sentence for subsequent conviction). Thus, our examination must involve the indictment rather than simply the federal statute itself.

Our examination of the federal indictment, however, is impossible because the indictment is not included in the record. Without the indictment, we cannot tell which, if any, of the numerous Oklahoma laws involving firearms in effect at the time Mr. Ives' federal conviction[9] may have applied to the conduct to which Mr. Ives plead guilty. We must therefore conclude Mr. Ives has not met his burden of showing his appellate counsel was ineffective. Likewise, Mr. Ives has not shown a miscarriage of justice will occur unless we review his claim.

3. Improper Jury Instructions

Third, Mr. Ives argues his appellate counsel should have argued the trial court erred in failing to instruct the jury members that they must all agree on a specific act or acts of abuse. Mr. Ives argues this claim is meritorious because, in Oklahoma, incest is not a continuing offense. Mr. Ives therefore argues the prosecution was required to "make an election of a specific act or acts it wish[ed] to prove beyond a reasonable doubt." Because the court did not so instruct the jury members, Mr. Ives believes some jurors may have believed one instance of abuse while other jurors believed a separate instance of abuse. Mr. Ives contends "the jury could [have reached] a non-unanimous verdict of guilt without agreeing on which act had been proven beyond a reasonable doubt, thus diluting the burden of proof and denying [Mr. Ives] his right to a unanimous verdict".

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[9] *See, e.g.*, Okla. Stat. Ann. Tit. 21, § 1283 (1983) (felon in possession of a firearm) (current version available at Okla. Stat. Ann. Tit. 21, § 1283 (2002)); Okla. Stat. Ann. Tit,. 21, § 1289.18 (1983 & Supp. 2000) (possession of a sawed-off shotgun or rifle) (current version available at Okla. Stat. Ann. Tit. 21, § 1289.18 (2002)).

Although Oklahoma law generally requires a conviction be based on a single act, *Cody v. State*, 361 P.2d 307 (Okla. Crim. App 1961), Oklahoma courts have carved an exception to this rule in child abuse cases where the abused child is "under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand." *Gilson v. State*, 8 P.3d 883, 899 (Okla. Crim. App. 2000) (quoting *Huddleston v. State*, 695 P.2d 8, 10-11 (Okla. Crim. App. 1985)), *cert. denied*, 532 U.S. 962 (2001). Under these circumstances, separate acts of abuse may be treated as one transaction. *Id.*

Mr. Ives argues the exception in Gilson and Huddleston does not apply in his case because the victim was never under his exclusive custody or domination. He points out that he did not live with the victim and her mother, and claims that after 1987 he was never alone with the victim. Consequently, he argues the victim "was under the custody and control of her mother, not [Mr. Ives]."

We conclude Mr. Ives' argument is without merit because there were sufficient facts to support treating the abuse as a continuing offense. Mr. Ives is the victim's biological father. The victim testified Mr. Ives sometimes stayed in her home. When he was there, Mr. Ives had control over the victim when her mother was asleep, in the shower, or at work. The victim also testified Mr. Ives abused her at his own house when the two of them were alone there in the afternoon after the victim had finished school for the day.

Based on these allegations we conclude the prosecution was entitled to treat the abuse allegations as a continuing offense. The district court did not err in failing to instruct the jury members they must agree on a specific act or acts of abuse. Mr. Ives' appellate counsel was not ineffective for

failing to raise such argument on direct appeal. Mr. Ives has not demonstrated cause for procedurally defaulting this claim. Further, because the claim is without merit, no miscarriage of justice will result from our decision not to excuse Mr. Ives' procedural default. *See Coleman*, 501 U.S. at 750.

In sum, we conclude Mr. Ives is not entitled to relief on his due process and collateral estoppel claim, his erroneous sentence enhancement claim, or his jury instruction claim. He has not proven cause for procedurally defaulting these claims, because he has not shown his appellate counsel was ineffective for failing to raise them on direct appeal. In addition, we conclude no miscarriage of justice will result from our refusal to overlook Mr. Ives' procedural default of these claims.

E. Ineffective Assistance of Appellate Counsel

Mr. Ives has two more general claims that his appellate counsel was ineffective. He believes his appellate counsel (1) improperly submitted his supplemental pro se pleadings which were then barred by the state court of appeals due to this error, and (2) was generally unfit to practice law. These claims are unpersuasive.

As discussed earlier, in the order to establish ineffective assistance, Mr. Ives must show his counsel's performance was constitutionally deficient and he was prejudiced by this deficiency. *Strickland*, 466 U.S. at 687.

We first consider Mr. Ives' claim his trial counsel was ineffective for failing to properly file Mr. Ives' pro se supplemental brief and materials. Although these materials apparently raised several issues, in this request for habeas

relief Mr. Ives focuses solely on his *Brady* claim, which we discussed in Part C of this opinion. Because we have already concluded Mr. Ives' *Brady* claim is without merit, he cannot satisfy the second prong of the *Strickland* test: that he was prejudiced by his counsel's failure to properly file these pleadings and by the Oklahoma Court of Criminal Appeals' subsequent refusal to review the meritless claim.[10]

Second, we address Mr. Ives' claim his appellate counsel was ineffective because counsel was generally unfit to practice law. As evidence his counsel was ineffective, Mr. Ives points to the fact that prior to his appeal, his counsel was suspended from practicing law for alcohol and substance abuse. Following Mr. Ives' appeal, his appellate counsel was again suspended for continued alcohol and substance abuse, as well as for conversion of client funds. Based on these disciplinary actions, Mr. Ives believes "at the time appellate counsel was representing Mr. Ives, [counsel] had severe alcohol and substance abuse problems." We are unpersuaded by Mr. Ives' argument.

The Supreme Court has instructed us that "[u]nder the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). The Supreme Court cautions that

> [w]hen examining attorney conduct, [we] must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply

[10] Alternatively, Mr. Ives argues appellate counsel was ineffective for failing to include the *Brady* claim in the brief he filed. This argument, likewise, fails because the *Brady* claim is meritless.

> the standards of professional conduct applicable to those it admits to practice in its courts.
>
> *Id.* Given these instructions, we are not free to grant Mr. Ives habeas relief simply because his appellate counsel was disciplined by the Oklahoma State Bar. *See United States v. Stevens*, 978 F.2d 565, 567 (10th Cir. 1992) (holding legal assistance provided by counsel disbarred prior to trial was not per se ineffective). Similarly, we will not conclude Mr. Ives' appellate counsel was ineffective based solely on Mr. Ives' allegations that counsel suffered from alcoholism and personal problems while representing Mr. Ives. *See Frye v. Lee*, 235 F.3d 897, 907 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001); *Bodin v. Calderon*, 59 F.3d, 815, 838 (9th Cir. 1996); *Caballero v. Keane*, 42 F.3d 738, 740)2d Cir. 1994); *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985); Young v. Zant, 727 F.2d 1489, 1492-93 (11th Cir. 1984); *Fowler v. Parratt*, 682 F.2d 746, 750 (8th Cir. 1982). Instead, Mr. Ives must show the alcoholism and personal problems had "some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." *United States v. Winkle*, 722 F.2d 605, 609 (10th Cir. 1983) (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

Mr. Ives argues his counsel's problems caused counsel to "omit[] meritorious issues for no valid strategic reason whatever'. Because Mr. Ives does not elaborate, we assume he is simply referring to the alleged deficiencies we addressed in parts D and E of this option. As we explained, each of these claims is meritless. Consequently, Mr. Ives is not entitled to relief based on the allegation appellate counsel was generally unfit to practice law.

In sum, we conclude that Mr. Ives has failed to establish the district erred in denying his petitioner for habeas based on his claims of (1) ineffective assistance of trial counsel; (2) improper testimony by witnesses in vouching for the victim's credibility; (3) improper suppression of exculpatory evidence by the prosecution; (4) the improper procedural bar of a number of claims by the state courts; and (5) ineffective assistance of appellate counsel.

The district court properly denied the petition for a writ of habeas corpus. The judgment of the district court is **AFFIRMED.**

Entered by the Court:

WADE BRORBY
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LARRY CARL IVES,

Petitioner-Appellant,

v.

BOBBY BOONE, Warden,

Respondent-Appellee.

No. 02-6397

ORDER
Filed June 7, 2004

Before **TACHA,** Chief Judge, **SEYMOUR,** Circuit Judge, and **BRORBY,** Senior Circuit Judge.

This matter is before the court on appellant's petition for rehearing and suggestion for rehearing en banc. Upon consideration, the petition for rehearing is denied, but the panel amends its order and judgment filed on May 3, 2004.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
Patrick Fisher, Clerk
By: (signature)
Deputy Clerk

(2) Supreme Court, U.S.
FILED
No. 04-402 SEP 7 - 2004
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY CARL IVES,

Petitioner,

v.

BOBBY BOONE, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A -- MAGISTRATE'S REPORT AND RECOMMENDATION DATED OCTOBER 25, 2001

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No.CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent,	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing through counsel, brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. In a previous referral, the undersigned recommend that the petition be denied except for four issues. As to those four issues, it was recommended that the parties provide supplemental briefing. United State District Judge Wayne E. Alley adopted the recommendation, and directed the parties to provide supplemental briefing on the following issues: (1) whether the trial court improperly allowed expert testimony vouching for the truthfulness of the victim's testimony; (2) whether the Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness; (3) whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (4) whether an evidentiary hearing is required regarding the conflict of interest issue. The case was then recommitted to the undersigned

Magistrate Judge for further preliminary proceedings consistent with 28 U.S.C. § 636(b)(1)(B). As directed by Judge Alley, a supplemental response to the petition has been filed, and Petitioner has replied. Thus, the matter is again at issue.

By this action, the Petitioner challenges his conviction of incest after former conviction of two or more felonies, for which he was sentenced to eight years imprisonment.[1] Case No. CRF-89-5444, District Court of Oklahoma County.

I. Procedural History

Following his conviction and sentencing on February 13, 1990, for rape and incest, the Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals. In that appeal, the Petitioner was represented by a new attorney, who raised nine propositions of error.[2] The Petitioner and his attorney also jointly filed a

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[1] The Petitioner was also convicted of and sentenced for rape, but this count was reversed on the Petitioner's direct appeal. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar 11, 1994)

[2] The Petitioner's appellate counsel raised the following propositions of error: (1) The Petitioner's conviction of both rape and incest violated the double jeopardy clause of the Fifth Amendment; (2) the admission of expert testimony that the alleged victim was truthful violated the Petitioner's right to s fair trial; (3) the trial court erred by allowing lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (4) the evidence presented was insufficient to prove that the Petitioner committed incest; (5) the trial court erred by failing to direct a verdict in the Petitioner's favor on the incest count; (6) the trial court erred by refusing to give Petitioner's requested jury instruction regarding the necessity of corroboration of the alleged victim's testimony; (7) it was fundamental error to allow the state's expert to testify that the alleged victim suffered from post-traumatic stress disorder; (8) the Petitioner was denied effective assistance of trial counsel; and (9) the Petitioner's sentences were excessive.

"Supplemental Pro Se Brief of Appellant", raising additional propositions of error. However, the Court of Criminal Appeals found this supplemental brief to be improperly filed, and deemed the issues raised therein to be waived on appeal.[3] In a summary opinion, the Oklahoma Court of Criminal Appeals granted relief to the Petitioner as to his rape conviction, which was reversed, but denied any relief with respect to his conviction for incest. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar 11, 1994).

On March 4, 1997, the Petitioner filed an application for post-conviction relief in the Oklahoma County District Court. The Petitioner raised nine propositions of error. [4] The district court held that all of the Petitioner's claims, other than his claim he was denied effective assistance of appellate counsel, had already been raised and rejected on direct appeal or could have been raised on direct appeal, and that they were therefore barred by the doctrine of res judicata or waived. Additionally, the court held that there was no evidence to suggest that the Petitioner was denied effective assistance of appellate counsel and denied the Petitioner's application for post-conviction relief. See Ives v. State, No. CF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997). The Oklahoma Court of

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[3] The Petitioner raised Ground Five (a) of his instant petition in that supplemental brief, and he expanded upon his arguments on tow other propositions of error that he raised in his direct appeal brief.

[4] The Petitioner raised the following propositions of error: (I) his sentence was improperly enhanced; (II) he was punished twice for the same offense in violation of the Fifth Amendment; (III) & (VI) prosecutorial misconduct deprived him of a fair trial; (IV) the trial court erred by allowing expert and lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (V) the trial court improperly instructed the jury; (VII) the accumulation of irregularities, errors, and prosecutorial misconduct denied the Petitioner of a fair trial; (VIII) the prosecution withheld and concealed exculpatory evidence; and (IX) the Petitioner was denied effective assistance of both trial and appellate counsel.

Criminal Appeals affirmed the denial of post-conviction relief on January 13, 1998, for substantially the same reasons cited by the district court. See Ives v. State, No. PO-97-704 (Okla. Crim. App. Jan. 13, 1998). The Petitioner then filed the instant petition on January 30, 1998.

As noted above, the undersigned Magistrate Judge recommended denial of the petition, except for four issues upon which supplemental briefing was needed. Petitioner objected in part to the recommended, and Respondent did not object. [5] Judge Alley adopted the recommendation in its entirety.

II. Standard for Granting a Writ of Habeas Corpus

The parties agree on the standard to be applied by this Court in considering the remaining issues. Review of actual and legal issues that have already been adjudicated in state court is laid out in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

[5] The undersigned notes Respondent's reassertion of this claim that Petitioner's ineffective assistance of trial counsel claim based upon an alleged conflict of interest is procedurally barred.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Habeas relief may therefore be granted if the Court finds that "the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the facts of the prisoner's case." Elliott v. Williams, 248 F.3d 1205, 1207 (10th Cir. 2001), cert. denied____ S.Ct. ____ Oct. 1, 2001).

III. Issues Remaining

A. Ineffective Assistance of Trial Counsel

As noted above, three of the four remaining issues are related to the performance of trial counsel. The first is whether the failure to call Laura Wilson, Petitioner's wife and the victim's mother, amounted to ineffective assistance of counsel in violation of Petitioner's Six Amendment rights. The second and related issue is whether Petitioner was denied effective assistance of counsel due to a disabling conflict of interest on the part of trial counsel. The third issue is whether an evidentiary hearing is required regarding Petitioner's allegation that trial counsel had a disabling conflict of interest. As will be explained below, the undersigned will address these issues in reverse order after a brief introduction.

1. Failure to call Laura Wilson as a defense witness.

Petitioner argues that his trial counsel was ineffective based on his failure to call Ms. Wilson,

Petitioner's wife and the victim's mother, as a witness for the defense. Specifically, he alleges that Ms. Wilson's testimony, if offered, would have severely undermined his daughter's credibility and bolstered that of Petitioner. He notes that trial counsel promised both the trial judge and the jury that she would testify, but later failed to call her as a witness without explanation.

2. Trial counsel's alleged conflict of interest

Petitioner further argues that trial counsel's failure to call Ms. Wilson was due to an undisclosed conflict of interest created by the fact that Ms. Wilson was being represented by trial counsel's law partner in ongoing juvenile court proceeding in which the district attorney's office "still held away over her parental rights". He argues that trial counsel failed to call Ms. Wilson to testify in Petitioner's behalf because it was not in Ms. Wilson's interest to oppose the district attorney's office in any way. Thus, Petitioner argues that trial counsel had an actual conflict of interest that deprived him of effective assistance of counsel.

3. Need for an evidentiary hearing

Although Petitioner attempted to raise the conflict of interest issue on direct appeal by his pro se "Motion for a New Trial with Brief in Support", "Motion to Supplement Pro Se Brief and Request to File Additional Documents", and "Supplemental Pro Se Brief of Appellant", he was not allowed to develop the factual basis for the claim. See Ives v. State, Case No. F-90-870, slip op. (Okla. Crim. App. Mar. 11, 1994) (Attached as Ex. B to Response to Petition for Writ of Habeas Corpus).[6] That – together with Respondent's complete

[6] The Oklahoma Court of Criminal Appeals stated that Petitioner's pro se Motion for a New Trial with Brief in Support was considered "as it

failure to address the conflict of interest issue in its original response – led the undersigned to request a brief on not only the conflict of interest issue, but on the necessity for an evidentiary hearing.

The undersigned finds that a hearing is necessary to determine whether an actual conflict of interest existed on the part of trial counsel. Because the undersigned recommends a hearing on that issue, it is also recommended that the Court defer consideration of the issue of whether trial counsel's failure to call Ms. Wilson was a witness constituted ineffective assistance. The evidence developed at the hearing on the conflict of interest issue, and perhaps the resolution of that issue, could affect determination of the ineffective assistance issue relating to the failure to call Ms. Wilson.

The Sixth Amendment right to counsel includes the "right to representation that is free from conflicts of interest". United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990) (quoting Wood v. Georgia, 450 U.S. 261, 271 (1981). Where there has been no timely objection at trial, a petitioner must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance." Id (quoting Culver v. Sullivan, 446 U.S. 335, 350 (1980)). The Tenth Circuit has defined "actual conflict" an "adverse effect" as follows:

> [I]n the context of the instant case, we hold that defense counsel's performance was adversely

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pertains to our review of the entire record for fundamental error". Ives v. State, Case No. F-90-870, Slip op. at 1 (Okla. Crim. App. Mar. 11, 1994). It made no statements as to whether the other two pro se motions, the Motion to Supplement Pro Se Brief and Request to File Additional Documents and the Supplemental P0ro Se Brief of Appellant, were considered. Id. at 2.

> affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests. No further showing of prejudice is necessary.

Bowie, 892 F.2d at 1500 (citations omitted). In support of his conflict of interest claim, Petitioner contends that his trial counsel and Mr. Kite – the lawyer who defended his wife in juvenile proceedings stemming from this same incident – were members of the same law firm. Respondent claims that Petitioner has not shown an actual conflict, but rather "baldly asserts that his counsel "actively represented conflicting interests". Supplemental Response, p. 24. Respondent continues that "trial counsel has unreservedly rebuffed [P]etitioner's bald assertions." Id. As proof, Respondent attaches a letter from Petitioner's trial counsel. Id., Supp. Ex. 1 (Letter from Larry W. Tedder to Patrick Crawley, dated January 23, 2001).

Despite Respondent's characterization of the conflict of interest claim, Petitioner has specifically identified evidentiary support for his allegation that trial counsel and counsel for Ms. Wilson were member of the same firm. Brief of Petitioner [Doc. No. 64], pp. 12-13. Petitioner cites evidence that (1) trial counsel and Mr. Kite shared offices and information regarding the case; (2) Petitioner and his family were told that trial counsel and Mr. Kite were members of the same law firm; (3) in an unrelated news story, The Daily Oklahoman referred to the law offices shared by trial counsel and Mr. Kite as a law firm; (4) trial counsel used letterhead listing trial counsel, Mr. Kite, and two other lawyers; (5) in a brief filed in later divorce proceedings between Petitioner and

Ms. Wilson, Mr. Kite confirmed that trial counsel and Mr. Kite officed together and that Ms. Kite's representation of Ms. Wilson continued after Petitioner's conviction; and (6) the Judge who presided over the criminal trial referred to "other members of trial counsel's firm" in a colloquy concerning the possibility that one of the other members would have to be substituted for ailing trial counsel. Id. at 12-13. Moreover, during voir dire, the judge asked Mr. Tedder to name the other lawyers in his firm, and Mr. Tedder named Mr. Kite. Transcript of Jury Trial, Vol. I, p. 45.

In arguing that trial counsel and Mr. Kite were not members of the same law firm, Respondent apparently concedes that multiple representation by lawyers in the same firm would result in an imputed conflict of interest under the Oklahoma Rules of Professional Conduct, Rule 1.10, Okla. Stat. Tit. 5, Ch. 1, App. 3-A: "(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, 1.9 or 2.2." The comment to the rule explains the principle involved:

> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated...

Okla. R. Prof. Conduct, Rule 1.10, cmt. (West 2001).

Particularly germane to the issue of whether an evidentiary hearing is required is the comment defining "firm." For purposes of the Rule of Professional Conduct, the term "firm" includes lawyers in a private firm...Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as in the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other. Id. At a minimum, Petitioner has presented enough evidence to warrant further fact-finding regarding the issue of whether trial counsel and Mr. Kite were indeed members of the same law firm, and whether the multiple representation of Petitioner and Ms. Wilson in separate litigation stemming from the same incident constituted a conflict of interest. See United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992)(discussing possible conflict arising from multiple representation).

As the Tenth Circuit stated in United States v. Alvarez: "If the client can establish the conflict actually affected the adequacy of his representation, prejudice is

presumed". 137 F.3d 1249, 1251 (10th Cir. 1998)(citing United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990)). The "adverse effect" here was trial counsel's failure to call Ms. Wilson as a witness, despite his stated contrary intent. Petitioner's decision to testify was apparently based upon his belief that Ms. Wilson's testimony would be available to corroborate his testimony. As Petitioner stated in his affidavit:

> 11. It was in these meetings, just prior to the criminal trial in February 1990, I told [trial counsel] that I would not go on the stand to testify in my own defense if I did not have Laura to corroborate my and the other defense witnesses. He assured me several times that he would be putting Laura on to testify, mainly because she had already testified under oath at the juvenile proceedings. [7]
>
> 12. During the voir dire and opening statements, [trial counsel] asked the jury and assured them that he would be putting Laura on to testify. He had also told my mother, my sister and my aunt (Myrtle Edmond) that he would be putting Laura on to testify, as well as my two experts, a Dr. Erwin Hall and Dr. H. Don Chumley, to corroborate their testimony as well.
>
> 14. At the least of the jury trial, which would have been February 8, a Thursday

[7] In a petition filed in the Juvenile Division of the District Court of Oklahoma County on April 25, 1989, the State sought to have Petitioner's daughter adjudicated as a "deprived child" under Okla. Sta. Tit. 10, § 1101.

[sic] at the end of the day, [trial counsel], my mother, sister and aunt were out in the hallway before I was taken back to the jail, and [trial counsel] told me to write down all the questions that I wanted to make sure for him to ask Laura the next day when she was put on the stand.

15. The next morning before we went back into the courtroom, [trial counsel] came up to me and asked if there was anything that I wanted for him to put in his closing argument. That's when I said that, I wanted the rest of my defense put on and he told me that he wouldn't be putting Laura on. I got the impression since it as Friday [sic] he just wanted to finish the trial and be over with.

16. The Sunday [sic] after the trial, [trial counsel] came to the county jail (February 11, 1990) and finally saw me. The formal sentencing was set for the following Tuesday [sic] February 13, 1990 (trial ended on February 9, 1990). It was at this time I presented to him a hand written letter that I was planning on giving to the Judge (Henderson) about how I felt I didn't get a fair trial when for some reason my counsel refused to put on a vital defense witness. It was at this time I got first hint of what conflict of interest was, because when he read this, he threatened me that if I showed this to the judge, he would not be there for the sentencing.

Affidavit of Larry Carl Ives, Vol. 6, Ex. T Appendix of Exhibits.

The Bowie definition of adverse affect as a "specific and seemingly valid or genuine alternative strategy" that was available to defense counsel, but which "was inherently in conflict with his duties toothers" could – depending upon the facts – be applicable here. In addition to the decision not to call Ms. Wilson, Petitioner states that "[trial counsel] failed to tell me for some times, Laura had been giving letters that I had wrote to her from the county jail to the state prosecutor (D.A.) and had started cooperating with the state in other areas, as in the still (to my knowledge) pending juvenile proceddings. That her doing this was done with the knowledge of her counsel Mr. Kite." Affidavit of Larry Carl Ives, ¶ 10 (Appendix of Exhibits, Vo. 6, Ex. T [Doc. No. 65]). The letter from trial counsel to Respondent corroborates this statement: "As we got closer to trial, however, Tom Kite told me that Laura's attitude toward Mr. Ives had changed and that she now believed her daughter." Supp. Ex. 1 to Supplemental Response (Letter of January 23, 2001, to Respondent's attorney from Larry Tedder.) Even if trial counsel was correct that Ms. Wilson's testimony might be different than he anticipated, he had Ms. Wilson's previous sworn testimony in the juvenile proceeding to use as impeachment. If the decision not to call Ms. Wilson was at all affected by conflicting loyalties to Wilson and Petitioner, it was arguably resolved in favor of Wilson at petitioner's expense.

A very similar situation was found to constitute an actual conflict of interest in Mann v. Ward, Case No. CIV-94-1489-A, slip op. at 24-25 (W.D. Okla. Dec. 13, 1995). In reaching his conclusion, Judge Alley quoted

from Church v. Sullivan: "The danger inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did; 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.'" 942 F.2d 1501, 1512 (10th Cir. 1991) (quoting Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)).

The undersigned finds that an evidentiary hearing is required to determine the conflict of interest issue. Petitioner has raised a colorable claim that trial counsel and Mr. Kite were members of the same firm, and that trial counsel failed to employ a seemingly valid strategy of calling Ms. Wilson and using her prior testimony, if necessary, as impeachment. If trial counsel and Mr. Kite were both members of the same firm, and there was an inherent conflict between the strategy of calling Ms. Wilson as a witness in Petitioner's criminal trial and the firm's loyalty to Ms. Wilson as a client in the juvenile proceeding, no further showing of prejudice is necessary. See United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

At a minimum,[8] the facts discovered at the hearing on the conflict issue will shed light on the issue of whether trail counsel was ineffective for failing to call Ms. Wilson. Accordingly, the undersigned further recommends that the Court defer its decision on that issue until after the evidentiary hearing.

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[8] If the evidence shows that an actual conflict adversely affected trial counsel's performance on behalf of Petitioner, it may well be unnecessary to make any further determination as to this ineffective assistance claim.

B. Testimony Vouching for the Victim

The remaining issue is whether the trial court improperly allowed witness testimony vouching for the testimony of Petitioner's daughter, the alleged victim. Among other testimony, Petitioner cites to that of a psychiatrist, Dr. Worley, in which she stated: "[I]n my experience you can tell when somebody is not telling you the truth. In my medical opinion she was sincere when I saw her." (Tr. 450.) Additionally, another psychiatrist, Dr. Calenzani, testified that he believed the victim to have been "in full contact with reality" and that he "fully believe[d] her." (Tr. 493.) Petitioner also cites to such vouching testimony by two lay witnesses.

These points were raised on direct appeal. The Oklahoma Court of Criminal Appeals described the propositions of error as follows "II. Fundamental error occurred with the admission of expert testimony that the alleged victim was truthful; and the allowance of such deprived Appellant of the right to a fair trial. III. The trail court erred in allowing lay witnesses to express opinions as to the victim's capacity for truthfulness." Ives v. State, Case No. F-90-870, slip op. at 2 (Okla. Crim. App. Mar. 11, 1994). The Oklahoma Court of Criminal Appeals found that with regard to these alleged errors "neither reversal nor modification is required under the law and evidence, nor is there a need to remand for an evidentiary hearing. Ives v. State, Case No. F-90-870. slip op. at 3 (Okla. Crim. App. Mar. 11, 1994).[9]

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[9] These same two errors were also raised in Petitioner's application for post-conviction relief: "IV Fundamental error of expert and lay witnesses vouching for the truthfulness of the alleged child victim, including psychiatric testimony that the incest occurred and that it was committed by Petitioner, which requires reversal where the State relies solely on testimonial evidence, in violation of Fourteenth Amendment equal

Peritonea's claim regarding vouching was thus considered and rejected on direct appeal. Accordingly, under 28 U.S.C. c 2254(d), Petitioner may not be granted habeas relief on this claim unless the state court's adjudication (1) resulted in a decision that was 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. A state court decision is "contrary to, or involve[s] an unreasonable application of clearly established Federal Law," for purposes of 28 U.S.C. § 2254(d)(1) if:

(1) the state court decision is in square conflict with the Supreme Court precedent which is controlling on law and fact; or (2) if no such controlling decision exists, the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant Supreme Court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. In short, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.

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protection and due process." Ives v. State, Case No. CF-89-4544, slip op. at 3 (Dist. Ct. Okla. County May 14, 1997). However, the state district court declined to consider the issue, concluding that it had been raised on direct appeal and was thus barred by res judicata. Id.

Roberts v. Ward, No. 98-6066, 1999 WL 162751 at *3 (10th Cir. Mar. 25, 1999), petition for cert. filed (Feb. 4, 2000).

Because state court rulings on evidentiary matters involve state law, they are generally unreveiwable on habeas corpus. Martin v. Kaiser, 907 F.2d 931, 934 (10th Cir. 1990) (error in admission of evidence is generally a matte of state law and not cognizable on habeas corpus). Rather, "[s]tate court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Brinlee v. Criso, 608 F.2d 839, 850 (10th Cir. 1979) (citing Gillihan v. Rodriguez, 551 F.2d 1182, 1192-93 (10th Cir. 19977)); Jackson v. Shanks, 143 F.3d 1313, 1322 (10th Cir. 1998); Vigil v. Transy, 917 F.2d 1277, 1280 (10th Cir. 1990); see also, Lee v. McCaughtry, 933 F.2d 536, 538 (7th Cir. 1991) ("[T]here is little point in case-by-case federal review of evidentiary rulings," as habeas review is "not just a rerun of the direct appeal."). The Petitioner is deprived pf a fundamentally fair trial if there is reasonable probability that in the absence of the erroneous evidentiary rulings, the outcome of the trial would have been different. See Tucker v. Kemp, 802 F.2d 1293, 1295-96 (11th Cir. 1986). Moreover, federal law dictates that a defendant cannot complain of an error which he invited upon himself. United States v. Chavez, 229 F.3d 946, 952 (10th Cir. 2000); United States v. Hooks, 780 F.2d 1526, 1534-35 (10th Cir. 1986). This is true under Oklahoma law as well. See Allen v. State, 871 P.2d 79, 95 (Okla. Crim. App. 1994); Harris v. State, 841 P.2d 597, 602 (Okla. Crim. App. 1992) (holding that a party may not complain about invited error).

Here, Petitioner complains that two experts, Dr. Linda Worley and Dr. David Calenzani, offered testimony to the effect that the victim was telling the truth. Brief of Petitioner [Doc. No. 64], p. 7-8. However, a review of the testimony cited by Petitioner reveals that Petitioner on cross-examination somewhat invited the very testimony of which he now complains. For example, the following colloquy took place with regard to Dr. Worley:

> Q. [by Mr. Tedder, counsel for Petitioner] Would it surprise you if you found out that [victim] is not and was not suicidal on April 18, 1989?
>
> A. Would it surprise me?
>
> Q. Yes.
>
> A. I don't know how I would find that out, because I felt like she was. She was writing notes to her teacher.
>
> Q. If you knew that she had testified in this courtroom earlier today that she was not suicidal and never intended to take her life, would you be surprised?
>
> A. I don't know. I think that sometimes people change their stories when they find out what the consequences of saying they're suicidal are. Sometimes they say - -
>
> Q. In other words, again, I'm not trying to put words in your mouth, you believe more of what

she said on March 8 than what she might have said in the courtroom today? April 18, excuse me.

A. I don't think that's the issue here. I mean - -

Q. In making your diagnosis, Doctor, you rely on truthful information, don't you, accurate information.

A. Well, I rely on my interview with the patient.

Q. An you rely on accurate information. If you don't get accurate information you can't make a valid diagnosis, can you?

A. I can make a diagnosis by what information I get. I cannot say whether it's accurate or not.

Q. I understand that, but my point is, if somebody comes in, again, for whatever reason they might have, and tells you a bunch of inaccurate information and you make a diagnosis, that diagnosis may not be valid in reality.

A. In my experience I have - - in my experience you can tell when somebody is not telling the truth. In my medical opinion she was sincere when I saw her.

Tr. Of Jury Trial, Vol II, p. 448, I. 25; p. 449, II. 1-25; p. 450, II. 1-6 (filed herein as Ex. S-5).

Immediately thereafter, Petitioner's counsel moved the court for a mistrial, stating that "this goes and flies directly in the face of my motion in limine the Court sustained as far as an expert opinion having to do with

this little girl telling the truth. The doctor has gone beyond the question I asked her." Id. At p. 450, II. 11-15. The prosecutor argued that the response had been invited, and the court agreed. Id. At p. 450, II. 23-25; p. 451, II. 1-25. Not only was the response invited, the context of the opinion was not whether the victim was being truthful about the sexual abuse, but whether she was actually suicidal on the date in question.

As with the exchange between trial counsel and Dr. Worley, Dr. Calenzani offered the opinion in question in response to questioning on cross-examination.

> Q. But when it comes right down to it, only they know whether they are in fact suicidal; is that right?
>
> A. No.
>
> Q. You wouldn't agree with that?
>
> A. I think that - - you see, there is where we need to make a psychiatric assessment. And the psychiatric assessment is a valid assessment that will come to the conclusion if you are suicidal or not. I think that - - that is what I base my work on.
>
> Q. Would you agree with Dr. Green's conclusion that there is evidence of disordered thinking, perceptual distortion and non-convential [sic] attitudes, all of which suggests that [victim] is not in good contact with reality?
>
> A. I think that [victim] was in full contact with reality. I think that all the information that

she gave me there was a reason it was given. It was a time of enormous turmoil and I fully believe her. That is why I believe.

Id. at 492, II. 7-25; p. 493, II. 1-4.

Petitioner relies upon the Oklahoma Court of Criminal Appeals decision in Lawrence v. State. 796 P.2d 1176, 1177 (Okla. Crim. App. 1990). In that case, the Court concluded that an expert witness cannot vouch for the truthfulness of an alleged victim. Id. The Court reasoned that such testimony was improper because "opinion evidence on who is telling the truth . . . is nothing more than the expert's opinion on how the case should be decided." Id. However, Oklahoma case law also recognizes that "many jurisdictions have allowed expert testimony describing the reactions of typical child victims of sexual abuse if it will assist the jury in deciding whether or not the alleged abuse occurred . . . [T]he fact that such evidence is incidentally corroborative does not render it inadmissible, since most expert testimony, in and of itself, tends to sow that another witness either is or is not telling the truth . . . . However, expert testimony may not be admitted to tell the jury who is correct or incorrect, who is lying and who is telling the truth. "Davenport v. State, 806 P.2d 655, 659 (Okla. Crim App 19991) (citations omitted); see also Okla. Stat. tit. 12, §2704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

Both experts responded fairly to the questions as posed to them. Moreover, the jurors were instructed in this case that it was their responsibility "to determine the credibility of each witness and the weight to be given the

testimony of each witness." Tr. Vol II, p. 267, II. 22-24. They were also instructed, with regard to expert witnesses, that they were "not required to surrender [their] own judgment to that of any person testifying as an expert, or to give controlling effect to the opinion of an expert, for the testimony of an expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive." Instruction No. 15, OUJI-CR-843 (Jury Instructions and Verdict Forms) (filed herein as part of Exhibit S-9). Petitioner is therefore not entitled to habeas relief on this claim, as he has not shown that the evidence in question rendered his trial so fundamentally unfair as to constitute a denial of constitutional rights.

Petitioner also complains that another witness, Officer Robert Tunnell, offered testimony that victim appeared "very sincere" when she claimed that "she was afraid of Petitioner because he would do anything to get her." Brief of Petitioner [Doc. No. 64], p. 9 (quoting Tr. Vol. II, p. 403, II. 7-18). This testimony was offered on direct examination:

> Q. [By the prosecutor, Mr. Keel] You said she made a - - with regard to her state of mind and her father at some point that evening while she was in your presence, did she make a statement?
>
> A. During that evening?
>
> Q. Yes, sir.
>
> A. Okay. When we had transported her from Children's to another facility where she would be staying in front of another doctor, she stated that she was afraid of her father and she made the

statement in front of me that, "You don't know what he will do. He will go to any lengths to get me."

Q. And based on your experience, the number of years that you've been a police officer and the number of people that you've talked to in stress-filled situations. Did she appear to be sincere to you when she was speaking of fear of her father?

A. Very.

Tr. Vol II, p. 403, II. 1-18. There was no objection.

This court addresses a similar issue in Swart v. Hargett, Case No. CIV-97-998-A (W.D. Okla.). There an Oklahoma prisoner was convicted of lewd molestation of a minor and forcible oral sodomy. Report and Recommendation at p. 1, Swart v. Hargett, Case No. CIV-97-998-A (W.D. Okla. Dec. 30.1998) (Roberts, J.), adopted Order at p. 3 (W.D. Okla. Mar. 17, 1999) (Alley, J.) (de novo review), appeal dismissed, 208 F.3d 227, 2000 WL 271746 (10th Cir. Mar. 13, 2000) (unpublished op.). The defendant later sought federal habeas relief, claiming that a detective had improperly vouched for the truthfulness of the victims. Id. at 10. This court rejected the claim, concluding that the detective's testimony "did not undermine the fundamental fairness of the trial" or "contribute to a miscarriage of justice . . . ." Id. at pp. 10-11. Moreover, the question here was directed to Officer Tunnell's perception as to the victim's state of mind. Based upon his own past experience, he testified that the victim seemed sincere in her fear of her father. He expressed no opinion about the cause of here fear, or about whether she was being truthful about the alleged

sexual abuse.[10] The undersigned finds that such statements did not undermine the fundamental fairness of the trial nor contribute to a miscarriage of justice.

Accordingly, the state appellate court's determination that the admission of the testimony of these witnesses did not merit relief is not contrary to or an unreasonable application of federal law as decided by the Supreme Court. Petitioner is therefore not entitled to habeas relief on this claim.

RECOMMENDATION

For these reasons, the undersigned recommends that the Court refer the matter back to the undersigned to schedule a hearing on the issues of whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance and whether Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness. The undersigned further recommends that the Court deny relief on the ground that the trial court improperly allowed expert testimony vouching for the truthfulness of the victim's testimony. The parties are

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[10] It should be noted that Petitioner does not in his supplemental brief address the propriety of the testimony of two lay witnesses: The victim's grandmother and her teacher. Respondent does address this testimony, stating that at the time of their testimony, the victim's character for truthfulness had been attacked. See Okla. Stat. tit. 12 § 2608; Fed.R.Evid. 608. Respondent also points out that the Oklahoma Evidence Code and the Federal Rules of Evidence allow a lay witness to testify about his or her opinions or inferences that are rationally based upon the witness's perception. See Okla. Stat. tit. 12 § 2701; Fed.R.Evid. 701. The undersigned agrees with Respondent that the testimony was proper, and in any event, did not undermine the fundamental fairness of the trial. Cf. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Vigil v. Tansy, 917 F.2d 1277, 1280 (10th Cir. 1990).

advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by November 14th, 2001, in accordance with 28 U.S.C. § 636 and Local Civil Rules 72.1 The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). Finally, the undersigned recommends that if this report and Recommendation is adopted, the case be recommitted to the undersigned Magistrate Judge for further preliminary proceedings.

ENTERED this 25th day of October, 2001.

DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX B – DISTRICT COURT ORDER DATED DECEMBER 18, 2001

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court for review of the Report and Recommendation of United States Magistrate Judge Doyle W. Argo issued October 25, 2001, and petitioner's objections.[11] The Report concerns four issues raised by the petition under 28 U.S.C. § 2254. As to one issue – the need for an evidentiary hearing – Judge Argo finds in favor of petitioner. Judge Argo recommends that he convene a hearing on two other issues relating to the performance of trial counsel and that a decision of these issues be deferred until after the hearing. As to the fourth issue – a claim of error in the admission of expert testimony vouching for the child victim's truthfulness – Judge Argo recommends denial of the claim. Petitioner's timely objections trigger the Court's duty to make a de

[11] Respondent has not objected and so has waived further review of the issues addressed in the report.

novo determination of issues raised. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).[12]

Petitioner seeks relief from a 1990 conviction of the incest after former conviction of two or more felonies, and a prison sentence of 80 years. Facts relevant to the improper vouching claim follow. Petitioner was accused of rape and sodomy of his daughter. His defense was that she had fabricated the allegations. Because there was no physical evidence of sexual abuse, the outcome of the trial hinged largely on the jury's assessment of the alleged victim's credibility. At trial, the prosecutor called as witnesses two psychiatrists who had treated the victim, Dr. Linda Worley and Dr. David Calenzani. During cross-examination, each responded to questions of defense counsel with testimony that petitioner now claims impermissibly vouched for the victim's truthfulness. Petitioner sees these statements as "harpoons" (Petr's Obj'n in Part, at 9); but Judge Argo finds them to be "somewhat invited" and fair responses to the questions posed. (Report & Recom. At 16, 19.) More importantly, Judge Argo concludes that petitioner "has not shown that the evidence in question rendered his trial so fundamentally unfair as to constitute a denial of constitutional rights." (Report & Recom. At 19.) Also, crucial to petitioner's quest for relief under § 2254(d)(1), Judge Argo finds that the state appellate court's determination that the admission of the testimony of these witnesses did not merit relief is not contrary to or an unreasonable application of federal law as decided by the Supreme Court." (Report & Recom. At 21.)

Before examining the substance of Judge Argo's findings, the Court first addresses an objection to the

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[12] The Court will consider both objections filed on petitioner's behalf, one prepared by his attorney and one submitted by the petitioner himself.

standard of decision. Judge Argo quotes both the statutory standard of § 2254(d)(1) and an amplification of its "unreasonable application" clause stated in *Roberts v. Ward*, No. 98-6066, 1999 WL 162751 at *3 (10th Cir. Mar. 25, 1999), to the effect that a state court decision is unreasonable if it applies "the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." (Report & Recom. At 14-15.) Petitioner correctly objects to this definition, which the Supreme Court expressly rejected in *Williams v. Taylor*, 529 U.S. 362, 409 (2000). Following *Williams*, the test is simply on of objective unreasonableness. *Id.* at 413.

Turning to Judge Argo's substantive analysis, petitioner objects on several points.[13] In an effort to satisfy the standard of § 2254(d)(1), he argues that the state court's rejection of his improper vouching claim was contrary to clearly established federal law as determined by the United States Supreme Court. This argument is misguided. Petitioner cites decisions involving the Federal Rules of Evidence, not federal constitutional rights. (Petr's Obj'n in Part, at 3-4; Petr's Pro Se Obj'n, at 3-4; discussing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Tome v. United States*, 513 U.S. 150 (1995); *Daubert v. Merrell Dow Pharm., Inc.*,

[13] As noted above, petitioner disagrees with Judge Argo's finding that the alleged vouching testimony was invited by defense counsel. Were it necessary to address this objection, the Court would reach the same conclusion as Judge Argo. The Court's independent review of the trial transcript reveals that the experts' statements were fair responses to questions posed on cross-examination. More fundamentally, the Court questions whether the experts' testimony was the sort of improper vouching prohibited by case law. Both Dr. Worley and Dr. Calenzani expressed confidence in their diagnoses; they testified about whether the alleged victim was truly suicidal. Neither addressed the truthfulness of her allegations of sexual abuse.

509 U.S. 579 (1993); *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999)).[14] Evidentiary errors in the petitioner's state court trial warrant habeas relief only if "they rendered the trial so fundamentally unfair that a denial of constitutional rights results." *Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000); *Duvall v. Reynolds*, 139 F.3d 768, 787 (10th Cir. 1998); *see Estelle v. McGuire*, 502 U.S. 62, 70 (1991). Thus the dispositive issue is whether petitioner has demonstrated that the erroneous admission of vouching testimony deprived him of a fair trial.

Petitioner criticizes Judge Argo's analysis of this issue as complete. Petitioner contends that Judge Argo failed to consider the prejudicial impact of the experts' testimony and the weakness of the prosecution's case. The Court finds merit in petitioner's legal premise.[15] The court of appeals has explained the proper analysis as follows:

> When the admission of evidence in a state trial is challenged on federal habeas, the question is whether the error, if any, was so grossly

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[14] The Court here provides a correct citation obtained through independent research. Both petitioner and his counsel incorrectly cite a vacated opinion in United States v. Charley, 176 F.3d 1265 (10th Cir. 1999), that was withdrawn and superseded on rehearing.

[15] Petitioner argues that the jury acquitted him of sodomy because this court alone was not affected by the vouching testimony. From the pro se objection, the Court gleans the basis of this argument to be that Dr. Worley testified about traits of victims of incest and rape; she did not mention sodomy. However, Dr. Worley also testified generally about sexual abuse. After careful review of the petitioner's arguments and the record, the Court finds no principled way to distingui9sh among the charges when considering the alleged prejudicial effect of the experts' testimony.

> prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process. This assessment requires examining both the reliability of the evidence and the significance at trial.

Williamson v. Ward, 110 F.3d 1508, 1522 (10th Cir. 1997) (citations omitted). The Court disagrees with petitioner, however, that any evidentiary errors denied him a fair trial. The credibility issues outlined in his brief (Petr's Obj'n in Part, at 4-7), were presented to the jury. The fact that petitioner was found guilty of rape and incest but acquitted of sodomy demonstrates that the jurors were capable of judging critically the victim's allegations and of rejecting those that were not proved beyond a reasonable doubt. Because jurors did not fully accept fully the truth of her accusations, the experts' testimony did not have the alleged effect of "put[ting] their scientific stamp of approval/validity to" the victim's story.[16] (Petr's Pro Se Obj'n at 7.) The two alleged instances of improper vouching appear in a trial transcript that spans over eight hundred pages. In the Court's view, the testimony of which petitioner now complains did not significantly impact the outcome of the case. The Court cannot say that the state courts' decision represents an unreasonable application of federal constitutional law.

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[16] Petitioner argues that the jury acquitted him of sodomy because this court alone was not affected by the vouching testimony. From the pro se objection, the Court gleans the basis of this argument to be that Dr. Worley testified about traits of victims of incest and rape; she did not mention sodomy. However, Dr. Worley also testified generally about sexual abuse. After careful review of petitioner's arguments and the record, the Court finds no principled way to distinguish among the charges when considering the alleged prejudicial effect of the experts' testimony.

For all of these reasons, the Court overrules petitioner's objections and adopts the Report and Recommendation. The matter is again referred to Judge Argo, this time for an evidentiary hearing on the remaining two issues relating to performance of trial counsel: (1) whether petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (2) whether petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness.

Petitioner's Motion for Leave of Court to File a Petitioner's Pro Se Objection (Docket No. 70) is granted. His previous pro se motions for leave to file a reply brief and for a judicial ruling (Docket Nos. 63, 66 & 67) are moot.

WAYNE ALLEY
United States District Judge

SUPPLEMENTAL APPENDIX C – MAGISTRATE'S REPORT AND RECOMMENDATION DATED MARCH 28, 2002

SUPPLEMENTAL APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing through counsel, brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. In a previous report and recommendation, the undersigned recommended that a hearing be conducted on two issues. United States District Judge Wayne E. Alley adopted the recommendation, and referred the matter for an evidentiary hearing on those two issues, both of which are related to the performance of Petitioner's trial counsel: (1) whether Petitioner's trial counsel labored under a conflict of interest that adversely affected his performance; and (2) whether Petitioner's trial counsel was constitutionally ineffective for failing to call Laura Wilson as a defense witness. An evidentiary hearing was conducted on February 28 and March 1, 2002, and this Report and Recommendation is now entered. For the

reasons set forth herein, it is recommended that the petition be denied.

By this action, Petitioner challenges his conviction of incest after former conviction of two or more felonies, for which he was sentenced to eighty years imprisonment. Case No. CRF-89-5444, District Court of Oklahoma County.

Procedural History

Following his conviction and sentencing on February 13, 1990, for rape and incest, Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals. In that appeal Petitioner was represented by a new attorney, who raised nine propositions of error.[17] Petitioner and his attorney also jointly filed a "Supplemental Pro Se Brief of Appellant," raising additional propositions of error. However, the Court of Criminal Appeals found this supplemental brief to be improperly filed, and deemed the issues raised therein to

[17] The Petitioner's appellate counsel raised the following propositions of error. (1) the Petitioner's conviction of both rape and incest violated the double jeopardy clause of the Fifth amendment; (II) the admission of expert testimony that the alleged victim was truthful violated the Petitioner's right to a fair trial; (III) the trial court erred by allowing lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (IV) the evidence presented was insufficient to prove that the Petitioner committed incest; (V) the trial court erred by failing to direct a verdict in the Petitioner's favor on the incest count; (IV) the trial court erred by refusing to give the Petitioner's requested jury instruction regarding the necessity of corroboration of the alleged victim's testimony; (VII) it was fundamental error to allow the state's expert to testify that the alleged victim suffered from post-traumatic stress disorder; (VIII) the Petitioner was denied effective assistance of trial counsel; and (IX) the Petitioner's sentences were excessive.

be waived on appeal.[18] In a summary opinion, the Oklahoma Court of Criminal Appeals granted relief to Petitioner as to his rape conviction, which was reversed, but denied any relief with respect to his conviction for incest. See Ives v. State, No. F-90-870 (Okla. Crim. App. Mar. 11, 1994).

On March 4, 1997, Petitioner filed an application for post-conviction relief in the Oklahoma County District Court. Petitioner raised nine propositions of error.[19] The district court held that all of Petitioner's claims, other than his claim that he was denied effective assistance of appellate counsel, had already been raised and rejected on direct appeal or could have been raised, and that they were therefore barred. Additionally, the court held that there was no evidence to suggest that Petitioner was denied effective assistance of appellate counsel and denied Petitioner's application for post-conviction relief. See Ives v. State, No. CF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997). The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief on January 13, 1998, for substantially the same reasons cited by the district court. See Ives v. State, No.

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[18] The Petitioner raised Ground Five (a) of his instant petition in that supplemental brief, and he expanded upon his arguments on two other propositions of error that he raised in his direct appeal brief.

[19] The Petitioner raised the following propositions of error: (I) his sentence was improperly enhanced; (II) he was punished twice for the same offense in violation of the Fifth Amendment; (III) & (VI) prosecutorial misconduct deprived him of a fair trial; (IV) the trial court erred by allowing expert and lay witnesses to testify regarding the alleged victim's capacity for truthfulness; (v) the trial court improperly instructed the jury; (VII) the accumulation of irregularities, errors and prosecutorial misconduct denied the Petitioner of a fair trial; (VIII) the prosecution withheld and concealed exculpatory evidence; and (IX) the Petitioner was denied effective assistance of both trial and appellate counsel.

PC-97-704 (Okla. Crim. App. Jan. 13, 1998). Petitioner then filed the instant petition on January 30, 1998.

The undersigned Magistrate Judge initially recommended denial of the petition, except for four issues upon which supplemental briefing was needed. Petitioner objected in part to the recommendation, and Respondent did not object. Judge Alley adopted the recommendation in its entirety. Upon re-referral, the undersigned recommended denial of relief for an alleged error in the admission of expert testimony vouching for the child victim's truthfulness. As to another issue, the need for an evidentiary hearing, the undersigned found in favor of the Petitioner, and recommended that a hearing be conducted on the remaining two issues. Judge Alley adopted that recommendation, and re-referred this matter for the purpose of conducting the hearing. The undersigned entered an order setting the matter for hearing on February 28, 2002.

The evidentiary hearing began on February 28, 2002, and concluded on March 1, 2002. Petitioner was present in person and by counsel on February 28, but waived his personal appearance and appeared only through counsel on March 1. Respondent appeared through counsel. During the hearing, Petitioner testified on his own behalf. He also called the following witnesses: Linda C. Bias, Dr. Irwin Hall III, Christine Ives, Sharisse L. O'Carroll, and Myrtle L. Edmond. Respondent called the Honorable Virgil C. Black, Charles T. (Thomas) Kite, and Larry Tedder.[20] Following the testimony of the witnesses and the introduction of exhibits, the hearing was concluded. At Petitioner's request, the undersigned gave both parties an opportunity to submit proposed

[20] Judge Black is a sitting state district judge in Oklahoma County.

findings of fact and conclusions of law.[21] Petitioner's proposed findings and conclusions have been filed, and so the matter is at issue.[22]

Summary of the Issues

Petitioner argues that his trial counsel was ineffective because he failed to call Ms. Laura Wilson, Petitioner's wife at the time and the victim's mother, as a witness for the defense.[23] Specifically, he alleges that Laura's testimony, if offered, would have severely undermined his daughter's credibility and bolstered that of Petitioner. He alleges that trial counsel promised Petitioner that Laura would be called to testify, and that trial counsel also referred to Laura's probable testimony in his opening statement. Petitioner claims that trial counsel's failure to call Laura was due to an undisclosed conflict of interest created by the fact that Laura was being represented by trial counsel's law partner in ongoing juvenile court proceedings in which the district

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[21] After the hearing, Petitioner filed a motion to supplement the record with relevant telephone directory listings. That motion is hereby granted, and the undersigned has considered the listings in reaching this recommendation. Petitioner himself filed a "Pro Se Statement of Facts to the Evidentiary Hearing." Although Petitioner is represented by counsel herein, that document has also been considered by the undersigned in preparing this report and recommendation.

[22] The undersigned gave respondent the option of responding to Petitioner's proposed findings and conclusions, but Respondent has indicated that a response will not be filed.

[23] Apparently Ms. Wilson was known by various last names during the relevant time period, so the parties at the evidentiary hearing typically referred to her as "Laura" so as to not confuse the witnesses. Therefore, the undersigned has also referred to her as "Laura" throughout this Report and Recommendation.

attorney's office "still held sway over her parental rights." He argues that trial counsel failed to call Laura to testify on Petitioner's behalf because it was not in Laura's interest to oppose the district attorney's office in any way. Thus, petitioner argues that trial counsel had an actual conflict of interest that deprived him of effective assistance of counsel.

Facts Established at the Hearing

Having observed the witnesses and heard their testimony, and having review the exhibits, the undersigned finds the facts to be as follows.

Prior to the criminal proceeding that resulted in the conviction attacked herein, Petitioner and his wife, Laura Wilson, were respondents in a juvenile court proceeding in which the state sought the adjudication of their daughter, as a deprived child. Hrg. Tr. Vol. 1, 8-9. The allegations in that juvenile proceeding were that the Petitioner had been involved in sexual misconduct with the daughter and that Laura had permitted such misconduct. Laura Wilson was represented in the juvenile proceeding by attorney Tom Kite. Hrg. Tr. Vol. 1, 10. Petitioner was represented by attorney Tom McCormack. Hrg. Tr. Vol. 1, 8. In that proceeding, the jury found the child to be a deprived child. Hrg. Tr. Vol. 1, 9. Thereafter, the Department of Human Services (DHS) required the child's mother, Laura Wilson, to complete a service plan. Hrg. Tr. Vol. 1, 182. The service plan consisted of things such as parenting skills classes and counseling. Hrg. Tr. Vol. 1, 188. If a parent does not complete the service plan, DHS will presume that conditions in the home have not changed and may move

to terminate parental rights. Hrg. Tr. Vol. 1, 188. Petitioner was charged with criminal conduct as a result of the accusations made by the child, and the juvenile proceeding was not put on hold as to Petitioner. Hrg. Tr. Vol. 1, 9, 24.

Laura Wilson was never charged criminally. Hrg. TR. Vol. 1, 185. Laura's attorney, Tom Kite, testified that he did not believe that Laura was vulnerable to criminal charges as a result of the events which were subject of the juvenile proceeding. Hrg. Tr. Vol. 1, 185. The district attorney never told Mr. Kite that he was considering criminal charges against Laura, and there was never any "deal" offered with respect to Laura. Hrg. Tr. Vol. 1, 185-86.

After criminal charges were brought, Petitioner was arrested and held in the Oklahoma County Jail. Hrg. Tr. Vol. 1, 9. While there he was visited by his mother, who was accompanied by Don Halbrook and attorney Larry Tedder. Hrg. Tr. Vol. 1, 9-10. The purpose of the meeting was to discuss the possibility of Mr. Tedder representing Petitioner in the criminal proceeding. Hrg. Tr. Vol 1, 9-10. According to Petitioner, at that meeting, Mr. Tedder told Petitioner that he was in the same firm with Laura Wilson's attorney in the juvenile proceeding, Tom Kite. Hrg. Tr. Vol. 1, 10. Mr. Tedder told Petitioner that he had access to Mr. Kite and to the juvenile proceeding records, and that he could discuss the case with Mr. Kite and to the juvenile proceeding records, and that he could discuss the case with Mr. Kite and coordinate the criminal and juvenile court proceedings. Hrg. Tr. Vol. 1, 10-11; Vol. 2, 273. Mr. Tedder represented Petitioner in the criminal case. Hrg. Tr. Vol. 1, 9.

At the time Petitioner retained Mr. Tedder to represent him in the criminal proceeding, Laura Wilson was still supportive of Petitioner. Hrg. Tr. Vol. 2, 219. Accordingly, Laura Wilson and Mr. Tedder met in the months leading up to the criminal trial, and she helped provide Mr. Tedder with background information about the case. Hrg. Tr. Vol. 2, 219, 253. Laura had given testimony at the juvenile proceeding that was generally favorable to Petitioner; she corroborated a physical condition that allegedly limited the Petitioner's ability to committed the sexual acts in the manner described by the child, confirmed that Petitioner and Laura maintained separate residences during the time the acts were allegedly committed, and testified that the child had a secretive relationship with her male softball coach during the period in question. Hrg. Tr. Vol. 1, 18; Hrg. Tr. Vol. 2, 275-76.

However, a few weeks prior to the trial, Laura Wilson stopped contacting Mr. Tedder, and would not return his telephone calls. Hrg. Tr. Vol. 2, 219, 278. Mr. Tedder asked Mr. Kite about Laura Wilson's failure to continue her past cooperation, and Mr. Kite told Mr. Tedder that Laura had changed her attitude and was no longer supportive of Petitioner. Hrg. Tr. Vol. 2, 246, 260, 278. Laura also stopped visiting Petitioner at the jail around Thanksgiving before his trial in February. Hrg. Tr. Vol. 1, 23. Both Mr. Kite and Dr. Irwin Hall testified that it is not uncommon for a wife whose husband is accused of sexually abusing their child to start out supportive of the husband, but then begin to believe the child and become angry and hostile toward the husband. Hrg. Tr. Vol. 1, 82-83, 186.

As soon as Mr. Tedder learned of Laura Wilson's change in attitude, he decided not to call her as a witness

in the criminal proceeding. Hrg. Tr. Vol. 2, 219, 221. Although Laura Wilson's record testimony at the juvenile proceeding was available to impeach her on some points should trial testimony be damaging to Petitioner, Mr. Tedder considered Laura to be a "very dangerous witness." Hrg. Tr. Vol. 2, 265, 270-71, 276-78. According to Mr. Tedder, one of the primary benefits of Laura's testimony to Petitioner's case was to give the jury the perception that Laura was supportive of Petitioner. Hrg. Tr. Vol. 2, 268, 277. Once Laura's attitude was no longer supportive, that strategic advantage disappeared. Id. Mr. Tedder believed that if he called Laura as a witness, she would do everything she could to harm Petitioner. Hrg. Tr. Vol. 2, 241. Moreover, Mr. Tedder believed that any corroboration that Laura could provide as to some factual matters was outweighed by the fact that Laura now believed her daughter. Hrg. Tr. Vol. 2, 265, 276-78. Dr. Irwin Hall testified that it was not uncommon for wives to start out supportive of a husband accused of incest, and then later "turn" on their spouses. Hrg. Tr. Vol. 1, 82-83. He also agreed that the wife is "not pleasant" to have as a witness in that situation. Hrg. Tr. Vol. 1, 82-83. Mr. Kite testified similarly, stating that 80-85% of women initially deny their husband's wrongdoing, and then changes occur so that they are extremely angry toward the spouse. Hrg. Tr. Vol 1, 183-84. When asked whether Laura became hostile toward Petitioner before trial, Mr. Kite stated that "hostile" was "understating her feelings at that time." Hrg. Tr. Vol. 1, 184. Upon questioning by Petitioner's counsel, Mr. Kite also expressed his opinion that impeaching a witness can so anger a jury that the attorney calling that witness must carefully weigh that risk against the importance of the testimony. Hrg. Tr. Vol. 1, 203-04. He also indicated that the value of Laura's testimony should be considered in light of the result in

the juvenile proceeding: "if it didn't fly one time, why would you expect it to fly a second time." Hrg. Tr. Vol. 1, 204.

Instead of calling Laura to testify about the impact of Petitioner's disability on his ability to have sexual relations in the missionary position, Mr. Tedder called a medical doctor to corroborate Petitioner's claim. Hrg. Tr. Vol. 2, 277. However, the district attorney tried to impeach the doctor's testimony by suggesting that only Petitioner's spouse would know how he could perform. Hrg. Tr. Vol. 2, 242. Laura's testimony that she and Petitioner maintained separate residences did not completely rule out access to the child, and, moreover, could be countered by Laura's testimony at the juvenile proceeding that he daughter walked to Petitioner's home each day after school. Hrg. Tr. Vol. 2, 265. As to Laura's testimony regarding her daughter's relationship with her softball coach, Mr. Tedder did not believe that he could get that evidence admitted at the criminal trial due to the rape shield law. Hrg. Tr. Vol. 2, 247.

At the time of the juvenile and criminal proceedings Tom Kite and Larry Tedder shared office space. Hrg. Tr. Vol. 1, 181. They were not partners. Id. Mr. Kite, Mr. Tedder, and the other attorneys who shared the space each contributed an equal amount to an overhead fund, from which expenses were paid. Hrg. Tr. Vol. 2, 273. They did not share fees, kept their active client files separate, and did not share confidential client information. Hrg. Tr. Vol. 2, 272-73, 275. The nature of their practice was such that secretaries did not have mutual access to each attorney's confidential client information. Hrg. Tr. Vol. 1, 163. Each attorney who had an office in the same suite had his or her name painted on the glass door that separated he reception area from the

building's hallway. Hrg. Tr. Vol. 1, 196. They also shared letterhead stationary that had the attorney's names. Id. They had one main telephone line, but each attorney had his or her own separate office. Id., Hrg. Tr. Vol. 1, 198, 200. Although the Oklahoma Legal Directory (the "Bluebook") had an individual listing for each attorney that in some instances was followed by a listing of all lawyers who shared the same office space, Mr. Tedder and Mr. Kite both testified at the hearing that they were unaware of the listing, and so made no effort to correct any inference that they were associated as a firm. Hrg. Tr. Vol. 1, 197-98, Hrg. Tr. Vol. 2, 230. Petitioner's mother and sister assumed Mr. Tedder and Mr. Kite were in the same firm because their names were on the door. Hrg. Tr. Vol. 1, 63, 69-70, 89-90. Petitioner's aunt just assumed Mr. Kite and Mr. Tedder were part of the same firm based upon discussion with the family. Hrg. Tr. Vol. 1, 173, 175-76. Her belief was not based upon anything Mr. Tedder said. Hrg. Tr. Vol. 1, 175-76. Dr. Irwin Hall testified that he also believed that Mr. Tedder and Mr. Kite were in the same firm, and thought Mr. Tedder had referred to Mr. Kite as "his partner." Hrg. Tr. Vol. 1, 80-81. During voir dire at the criminal proceeding, the trial judge asked Mr. Tedder to identify the other members of his "firm." Hrg. Tr. Vol. 2, 233. Mr. Tedder named the other attorneys with whom he shared office space. Id. He did not attempt to set forth the exact legal relationship between the attorneys because that was not germane given the purpose of trial judge's question. Hrg. Tr. Vol. 2, 266. In conversations with a layperson, Mr. Tedder might have referred to another attorney in the office as "my office partner." Hrg. Tr. Vol. 2, 259.

In handling Petitioner's case, Mr. Tedder shared no confidential information with Mr. Kite. Hrg. Tr. Vol.

2, 275. The nature of his discussions with Mr. Kite about the case was not affected by the fact that they shared office space. Id. The conversations were no different than they would have been had Mr. Kite's office been "six block or six miles" away. Id. Mr. Tedder would have attempted to have the same type of conversations with any lawyer representing Laura, whether he knew the lawyer or not. Hrg. Tr. Vol. 2, 279.

In his opening statement at the criminal trial, MR. Tedder discussed what he believed Laura's testimony would be. Hrg. Tr. Vol. 1, 26-27; Hrg. Tr. Vol. 2, 249-50. Although Mr. Tedder had already decided not to call Laura, it was his belief that the prosecution might call her as a witness. Hrg. Tr. Vol. 2, 250. Petitioner and his sister, aunt, and mother testified that on the next to the last day of trial, Mr. Tedder asked Petitioner to come up with a list of questions to ask Laura. Hrg. Tr. Vol. 1, 28, 67, 69, 96, 174. Dr. Hall testified that Mr. Tedder also asked Hall to assist him in coming up with questions for Laura in the week before trial began. Hrg. Tr. Vol. 1, 81-82. However, Mr. Tedder testified that he did not recall asking for help in developing questions for Laura, and that he would never seek a lay person's assistance in coming up with questions to be asked of a witness at trial. Hrg. Tr. Vol. 2, 248, 274. He testified that Petitioner may have given him such a list, but that it was not requested. Id. Although Petitioner, his sister, his mother, and his aunt all testified that they were surprised to learn on the last day of trial that Mr. Tedder was not going to call Laura, Mr. Tedder testified that he had informed Petitioner and probably Petitioner's family of that decision the weeks before trial. Hrg. Tr. Vol. 1, 29, 67, 174; Hrg. Tr. Vol. 2, 221, 249.

Although Petitioner claimed that he wrote a letter to the trial judge after the verdict but before sentencing, complaining about Mr. Tedder – especially with regard to Mr. Tedder's decision to not call Laura as a witness – and had shown it to Mr. Tedder before sentencing, Mr. Tedder testified that he did not recall such a letter. Id. Petitioner produced no such letter at the hearing, and stated that it was probably "somewhere on the farm." Hrg. Tr. Vol. 1, 59-60. He also admitted that the letter had not been attached to any of his post conviction proceedings. Id.

Mr. Tedder testified that his decision not to call Laura was based upon his judgment as to what was in the best interests of his client. Hrg. Tr. Vol. 2, 252. He further testified that he had no concern about Laura's legal status, and that he would have called her without hesitation if he believed it would benefit the Petitioner. Hrg. Tr. Vol. 2, 252-53.

Legal Analysis

The Sixth Amendment right to effective assistance of counsel includes the "right to representation that is free from conflicts of interest." United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990) (quoting Wood v. Georgia, 450 U.S. 261, 271 (1981). Under Strickland v. Washington, 466 U.S. 668 (1984), a petitioner who seeks to establish a claim of ineffective assistance of counsel must normally demonstrate both that counsel's performance fell below an objective standard of reasonableness and that the Petitioner suffered prejudice as a result thereof. Id. at 694. However, a somewhat different standard applied when a claim of ineffective assistance of counsel is based on an alleged conflict of interest. Where, as here, there has been no timely

objection at trial, Petitioner cannot prevail unless he demonstrates " that counsel actively represented conflicting interest and that an actual conflict of interest adversely affected his lawyer's performance." Bryan v. Gibson, 276 F.3d 1163, 1172 (10th Cir. 2001) (quoting Burger v. Kemp, 483 U.S. 776, 783 (1987)); see also Culver v. Sullivan, 446 U.S. 335, 350 (1980) (a petitioner must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance."). "The mere possibility of a conflict, however, is insufficient." Bryan, 276 F.3d at 1173.

Turning first to the "actual conflict" element, one attorney's simultaneous representation of two clients with interests in the same litigation can create the potential for a conflict of interest. See Comment to Rule 1.7, Oklahoma Rules of Professional Conduct, Okla. Stat. Tit. 5, Ch. 1, App. 3-A. Likewise, multiple representation by lawyers in the same firm can result in an imputed disqualification on conflict of interest grounds.[24]

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[24] The threshold inquiry appears to be whether the attorneys have held themselves out to be or conducted themselves as a firm. When lawyers not only share office space, but also use common letterhead claiming that they are "an association of attorneys at law," they have been found to be a law firm for the purpose of the imputed disqualification rule. United States v. Cheshire, 707 F.Supp. 235, 241 (M.D. La. 1989) (lawyers who are not actually associated are members of a "law firm" for the purposes of Rule 1.10, without regard to whether the lawyers shared information or knowledge); Tennessee v. Bryan, No. M1999-00854-CCA-R9-CD, 2000 WL 1131890, at *1, 8 (Tenn. Crim. App. Aug. 4, 2000) (maintenance of separate practices not determinative where two attorneys share a joint advertisement in "Yellow Pages," listing their names, the same area of practice, and one telephone number.) Where the attorneys have not held themselves out as a law firm, other factors are considered, such as whether the physical organization and actual operation of the office space is such that the confidential client information of each lawyer is secure from the others. See Restatement (Third) of Law Governing Lawyers § 203, cmt. E (1996).

Oklahoma Rules of Professional Conduct, Rule 1.10, Okla. Stat. Tit. 5, Ch. 1, App. 3-A: "(a) While layers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited by doing so by Rules 1.7, 1.8, 1.9 or 2.2." The comment to the rule explains the principle involved:

> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applied to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated . . . .

Okla. R. Prof. Conduct, Rule 1.10, cmt. (West 2001).

However, because joint representation of co-defendants creates a potential conflict of interest, it "is not *per se* violative of constitutional guarantees of effective assistance of counsel." Burger v. Kemp, 483 U.S. 776, 783 (1987) (quoting Holloway v. Arkansas, 435 U.S. 475, 482 (1978)). In Burger, counsel represented petitioner, and his partner was appointed to represent the petitioner's co-defendant in his later, separate trial. Id. at 780-81. The petitioner's counsel assisted his partner in the defense of the petitioner's co-defendant. Id. at 781. The two shared research and discussed the cases with one another. Id. Although the petitioner was arguably the less culpable of the two defendants, at trial each defendant sought to emphasize the culpability of the other in order to avoid the death penalty. Id. at 779, 781.

The petitioner's counsel prepared briefs for both the petitioner and his co-defendant on their second appeal. Id. at 784.

"Assuming without deciding that two law partners are considered one attorney," the Supreme Court nonetheless agreed with the lower court's conclusion that there was no actual conflict of interest. Burger, 483 U.S. at 783. Noting that defendant may actually benefit from joint efforts of two partners, the Court cited the presumption that "the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." Id. at 783 – 84. The Court also stated that the separate trials in that case significantly reduced the potential that the interest of the petitioner and his co-defendant would diverge. Id.

The Court rejected the petitioner's effort to show an actual conflict by his counsel's failure to make the "lesser culpability" argument in the appeal brief: "Given the fact that it was the petitioner who actually killed [the victim] . . . the decision to forgo this issue had a sound strategic basis." Id. Additionally, the Court found that "determining that there was an actual conflict of interest requires the attribution of [counsel's] motivation for not making the 'lesser culpability' argument to the fact that his partner was [the co-defendant's] lawyer, or to the further fact that he assisted his partner in that representation." Id. at 784-85. The Court refused to substitute its speculation for the trial court's finding that counsel was not motivated by the fact that his partner was the co-defendant's lawyer. Id. at 785.

In a case just handed down yesterday by the Supreme Court, it was again emphasized that the "purpose of out Holloway and Sullivan exceptions from

the ordinary requirements of Strickland, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendants Sixth Amendment right to counsel." Mickens v. Taylor, No. 00-9285, 2002 WL 459251 (U.S. Mar. 27, 2002). After noting that some Courts of Appeals had "applied Sullivan 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts," the Supreme Court stated:

It must be said, however, that the language of Sullivan itself does not clearly establish, or indeed even support, such expansive application. "Until," it said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. (quoting Sullivan, 446 U.S. at 350) (emphasis added by Mickens).

Thus, under the teaching of Burger and Mickens, petitioner here must show more than an imputed disqualification. Even if his trial counsel was a member of the same law firm as counsel for Laura, such would not per se constitute ineffective assistance of counsel. Petitioner must show that an actual conflict of interest existed. "Thus our inquiry is not whether a state disciplinary rule for lawyers has been violated by [counsel]. But whether, everything considered, Appellant's counsel 'actively' represented conflicting interests." United States v. Gallegos, 39 F.3d 276, 278 (10th Cir. 1994) (emphasis in original); see also United States v. Sabbach, 98 F.Supp.2d 680, 692 (D.Md. 2000) ("It might be that the potential for conflict arguably violated some disciplinary rule, but that is not the question . . . ."). The undersigned concludes that

Petitioner has not shown that his counsel actively represented conflicting interests here.

Here, Laura and Petitioner were not co-defendants in the criminal proceeding. Although Laura and Petitioner had both been respondents in the juvenile proceeding, and Laura was completing a service plan as a result of that proceeding, there was no sharing of confidential information between Mr. Kite and Mr. Tedder. Mr. Tedder was convincing in his testimony that any information he shared with Mr. Kite was exactly the same information that he would have shared with any attorney representing Petitioner's wife in the juvenile proceeding. He was also believable when he testified that he would have not hesitated to call Laura as a witness if he thought that strategy would have benefited Petitioner. However, it was Mr. Tedder's belief that the primary advantage to be gained from calling Laura had been lost due to her change in attitude toward Petitioner. Mr. Tedder decided not to not call Laura when she stopped cooperating with him and refused to return his telephone calls. Based on his belief that Laura, if called as a witness, would do anything she could to harm Petitioner, Mr. Tedder made a strategic decision not to call her as a defense witness. There was no evidence that his decision was in any way attributable to the fact that Mr. Kite represented Laura in the juvenile proceeding.

Even if Petitioner has shown that Mr. Tedder actively represented conflicting interests, he did not show that such adversely affected his lawyer's performance. "[D]efense counsel's performance [is] adversely affected by an actual conflict of interest is a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal

interests." United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990); see also United States v. Rodriguez Rodriguez. 929 F.2d 747 (1st Cir. 1991) (adverse effect shown where plausible alternative strategy not undertaken due to inherent conflict). The term "alternative defense strategy" does not embrace all possible courses of action open to a defense attorney; instead, it refers to those which a zealous advocate would reasonably pursue under the circumstances. See Lopez v. Scully, 58 F.3d 38, 42 (2d Cir. 1995).

The "alternative defense strategy" identified by Petitioner was calling Laura as a defense witness. Although his strategy might be plausible, Mr. Tedder believed it was more reasonable not to call Laura in light of her probable change in attitude toward Petitioner. Moreover, Mr. Tedder's decision was not based upon any inherent conflict in the positions of Petitioner and Laura. It is Petitioner's position that Laura's favorable testimony at trial would have exposed her to the risk that DHS would move to terminate her parental rights. However, Mr. Tedder's strategy was based upon his belief that Laura's testimony *would not be favorable.* Accordingly, Laura's testimony would have had no adverse affect on her legal position, and there was not benefit to her from Mr. Tedder's decision not to use her as a defense witness. There was, however, considerable risk to Petitioner if Laura was called as a witness – it would have been clear to the jury that Laura no longer supported Petitioner, despite Petitioner's opportunity to perhaps impeach her testimony from the testimony she gave during the juvenile proceeding. Thus, there was no inherent conflict between their positions.

As stated by the Eleventh Circuit, a petitioner must show three things to prove adverse effect: (1) that

his counsel could have pursued a plausible alternative strategy; (2) that the alternative strategy was reasonable; and (3) that the strategy was not followed because it conflicted with counsel's external loyalties. Reynolds v. Chapman, 253 F.3d 1337, 1343 (11th Cir. 2001). Even if the first two of these elements are satisfied here, the third is not. Petitioner cannot show that Mr. Tedder's performance was adversely affected by a conflict of interest. Accordingly, the undersigned recommends denial of the petition on the ground that Petitioner's Sixth Amendment right to the effective assistance of counsel was violated because of a conflict of interest.

Ineffective Assistance of Trial Counsel

As there was no actual conflict of interest that adversely affected counsel's representation of Petitioner, the undersigned will turn to Petitioner's general claim of ineffective assistance. As noted above, the familiar standard set forth in Strickland v. Washington, 466 U.S. 668, 687-688 (1984), governs ineffective assistance of counsel claims. The two-part Strickland test requires Petitioner to show both constitutionally deficient performance and prejudice. Id. at 694. To show constitutionally deficient performance, a petitioner must show that his attorney "committed serious errors in light of prevailing professional norms such that his legal representation fell below an objective standard of reasonableness." Castro v. Ward, 138 F.3d 810, 829 (10th Cir. 1998) (quotations omitted). Counsel's performance must have been completely unreasonable not merely wrong. Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997). In determining whether Petitioner has made this showing, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance" and should grant relief only if the challenged conduct cannot, under the circumstances, "be considered sound trial strategy." Strickland, 466 U.S. at 689. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). To show prejudice, Strickland requires a petitioner to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

The evidence shows that counsel's decision not to present Laura as a defense witness was sound trial strategy, and was not unreasonable given Laura's probable hostile attitude. Whether or not to call a witness is generally a tactical decision within the discretion of trial counsel. Jackson v. Shanks, 143 F.3d 1313, 1320 (10th Cir. 1998). Mr. Tedder had considerable criminal trial experience, and at the hearing articulated sound reasons for his decision not to call Laura – reasons that were supported by testimony of other witnesses at the hearing.

In light of the inherent strategic nature of such decisions, the very real risks posed by Laura's hostile attitude, and the ability to get helpful facts through other witnesses, Mr. Tedder's decision not to call Laura fell within the wide range of reasonable professional assistance. As the first prong of the Strickland test is not met, there is not need to consider whether the decision not to call Laura was prejudicial.

Recommendation

For these reasons, the undersigned recommends that the petition for a writ of habeas corpus be denied. The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of

this Court by April 17th, 2002, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). This Report and Recommendation disposes of all the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 28th day of March, 2002.

DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE

SUPPLEMENTAL APPENDIX D –
DISTRICT COURT ORDER DATED
OCTOBER 7, 2002

SUPPLEMENTAL APPENDIX D

IN THE WESTERN DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LARRY CARL IVES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-98-363-A**
	)	
BOBBY BOONE, Warden,	)	
	)	
Respondent.	)	

ORDER

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Doyle W. Argo issued March 28, 2002. The Report concerns two remaining claims raised by the petition under 28 U.S.C § 2254.[25] These claims were the subject of an evidentiary hearing conducted by Judge Argo on February 28 and March 1, 2002. Based on the existing record, evidence presented at the hearing, and written arguments of counsel, Judge Argo recommends denial of petitioner's claims that he received constitutionally ineffective assistance of counsel during his state court criminal trial due to (1) counsel's failure to call Laura

[25] The petition has been the subject of three previous reports of the magistrate judge issued September 21, 1998, September 15, 2000, and October 25, 2001; and three orders adopting those reports. (Orders of Oct. 15, 1998; Dec. 7, 2000; Dec. 18, 2001.)

Wilson as a defense witness and (2) the existence of a conflict of interest that adversely affected counsel's performance. The Court must make a de novo determination of specific issues raised by petitioner's timely objections. See 28 U.S.C § 636(b)(1); Fed. R. Civ. P. 72(b).[26]

Petitioner seeks relief from a 1990 conviction of incest after former conviction of two or more felonies, and a prison sentence of 80 years. Petitioner was accused of sexually abusing his daughter, Wendy, beginning in 1985 and continuing intermittently until 1989.[27] His trial defense was that Wendy, who was then fourteen years old, had fabricated the allegations. Wendy was raped in 1984 by another man, a friend of her stepfather, and after this event, she began exhibiting emotional and

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[26] As with previous objections, the Court has received separate submissions from petitioner and his retained counsel. Petitioner has made numerous other filings for himself, including a "Pro Se Formal Complaint Against State Witness Larry Tedder," a motion to deem that complaint confessed, and a "Pro Se Motion for the Court to Issue an Order to Retrieve Records from the Oklahoma Administrative Office of the Court." His attorney also has filed motions, one requesting consideration of petitioner's pro se objection and complaint against Larry Tedder and another requesting oral argument on the objections. Finally, at the Court's request, respondent has filed a response to petitioner's objections, to which petitioner has replied pro se. The Court has considered all of these materials, and rules on pending motions below.

[27] The information as amended at trial used a later starting date due to the statute of limitations. (Jury Trial Tr. At 271-73, 755.) The three-count information included charges of first-degree rape, forcible sodomy, and incest. The sodomy allegedly occurred during a shorter time period, from October 1988 until 1989. The jury acquitted petitioner of the sodomy charge but found him guilty of rape and incest. The Oklahoma Court of Criminal Appeals found the convictions of both rape and incest to be duplicitous and vacated the rape conviction and its concomitant prison sentence of 40 years.

behavioral problems. In 1987, Wendy first made allegations of sexual abuse by petitioner that were not pursued because she recanted. At trial, the defense sought to portray Wendy as a troubled adolescent who resented her father's delayed involvement in her life and his discipline.[28] Petitioner also presented defenses of lack of opportunity (he did not live in the same house with Wendy and was incarcerated for four months in 1986) and physical incapacity (he suffered several accidental injuries, including a gunshot wound to his right arm in February 1988, that allegedly rendered him incapable of engaging in sexual intercourse in the manner claimed by Wendy). The outcome of the trial hinged on the jury's credibility assessments; no forensic evidence was presented.

Before the criminal case was filed, Wendy's allegations against petitioner had been the subject of state juvenile proceedings against him and Wendy's mother, Laura, who was then married to petitioner.[29] All three interested parties in that proceeding (Wendy, Laura and petitioner) testified during a jury trial of the juvenile court charges, which resulted in a determination, that Wendy was a deprived child. Laura was represented by Tom Kite, an attorney who shared office space with petitioner's criminal defense lawyer, Larry Tedder. Mr. Tedder was hired to defend petitioner against the

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[28] Petitioner did not publicly acknowledge paternity of Wendy until she was eight or nine years old and did not become involved in her parenting until she became ten or eleven.

[29] Laura's marriage to petitioner followed her divorce from a man named Carl Wilson, and she continued to use the last name Wilson. She was referred to throughout the criminal trial and the evidentiary hearing simply by her first name, and the Court adopts this convention.

criminal charges; he did not represent petitioner during the earlier juvenile proceeding.[30]

MR. Tedder did not call Laura to testify as a defense witness during the criminal trial, even though he mentioned her anticipated testimony during arguments on pretrial motions, jury selection and his opening statement. Witnesses he did call were: A licensed counselor who testified about petitioner's psychological profile and Wendy's diagnosis; a medical doctor who testified about his treatment of petitioner's injuries and petitioner's physical condition during 1997 and 1998; and petitioner's aunt, Myrtle Edmond, a counselor with whom Wendy informally discussed her emotional problems and in whom Wendy confided. Petitioner also testified in his own defense.

Petitioner's pending claims for habeas relief – ineffective trial counsel due to failure to call Laura as a defense witness and a conflict of interest – were raised on direct appeal and summarily rejected by the Oklahoma Court of Criminal Appeals. This summary disposition is an "adjudication on the merits" that is entitled to deference under 28 U.S.C. § 2254(d). *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999). However, petitioner did not receive an evidentiary hearing on these claims in state court proceedings, *id.* § 2254(e)(2), and because he made allegations that, if true, would entitle him to relief, *Mayes v. Gibson*, 210 F.3d 1284, 1287 (10th Cir.), *cert. denied*, 531 U.S. 1020 (2000), he was afforded an evidentiary hearing by Judge Argo, which is discussed below.

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[30] Petitioner was represented in the juvenile proceeding by attorney Thomas McCormick.

ALLEGED VIOLATION OF THE RULE OF SEQUESTRATION

Before discussing the substance of Judge Argo's Report, the Court will address a procedural issue that came up after the report was issued – an alleged violation of the rule of sequestration invoked by petitioner's counsel at the start of the evidentiary hearing. Petitioner has filed a "Pro Se Formal Complaint Against State Witness Larry Tedder for a Violation of Title 28 U.S.C.A., Rule 615, an Offense in Violation of Magistrate Judge Argo's Sequestration Order." By this filing, petitioner complains that Mr. Tedder's testimony at the hearing reveals that he discussed the case with Laura while he was waiting outside the courtroom to be called as a witness. Petitioner alleges that he was prejudiced by this apparent violation of "the Rule" and asks that an appropriate sanction be assessed against Mr. Tedder "to include, if deemed allowable by the Court, striking his testimony" from the record. (Pro Se Formal Complaint, at 6.) The Court denies this request for two reasons.

First, the Court finds no rule violation. Judge Argo's sequestration order did extend the dictates of Rule 615, which provides for exclusion of witnesses, and direct excluded person "not to discuss your testimony with anybody other than the attorneys in the case." (Hr'g Tr. At 6.) Rule 615 provides exceptions, however, and two arguably apply here. The rule does not authorize exclusion of a party or a person whose presence is "essential to the presentation of a party's cause." Fed. R. Evid. 615(3). In my view, when an attorney's former client accuses him of incompetence through a claim of ineffective assistance of counsel, the attorney is the real party in interest, even though the State or custodial officer appears as the named respondent. At the least, the

accused attorney is essential to the State's defense against the ineffective assistance claim. I would permit, and actually have permitted, an accused attorney to remain in the courtroom during a hearing on an ineffective assistance of counsel claim and, if requested, to sit at counsel table with the respondent's attorney. For these reasons, Mr. Tedder need not have been excluded from the courtroom at all and was not prohibited from discussing the case with other persons.

Second, if a violation occurred, the sanction sought by petitioner would be unwarranted. When a witness violates a sequestration order, a trial court has discretion to exclude the witness's testimony, but "the witness generally should not be disqualified," particularly when there has been no suggestion that the party who sponsored the witness "knew of, or in bad faith allowed" the violation. *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975, 980 (10th Cir. 1996); *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978). Also, because petitioner made no contemporaneous objection but raised this issue only on review, the burden rests on him to show that the alleged violation caused him "probable prejudice." *Burks*, 81 F.3d at 980; *United States v. Pritchard*, 781 F.2d 179, 183 (10th Cir. 1986); *see United States v. Salcido-Luzania*, No. 97-2399, 1999 WL 176130 at *6 (10th Cir. March 31, 1999). The Court is unpersuaded by petitioner's argument that he was prejudiced by Mr. Tedder's alleged discussion of the case with Laura, who was not a witness at the hearing. The extent and nature of their alleged conversation is unknown. The only apparent effect is that it enabled Mr. Tedder to opine during his testimony that he made a "good decision" when he elected not to call Laura as a defense witness during petitioner's criminal trial. Whether in retrospect this tactical decision was a good or bad one if not an issue in this case.

STANDARD OF DECISION

Petitioner urges the Court to fulfill its obligation to make a de novo determination of the issues addressed in the Report and Recommendation by rejecting Judge Argo's factual findings and by substituting its own findings in their place. This the Court declines to do. The de novo standard imposed by § 636(b)(1) requires a new determination, not a new hearing. The statute is designed "to permit whatever reliance a district judge, in the exercise of sound judicial discretion, [chooses] to place on a magistrate judge's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980); *see Andrews v. Deland*, 943 F.2d 1162, 1170 (10th Cir. 1991). Here, the Court has performed its duty of de novo review by considering the actual testimony and evidence received at the hearing and other relevant portions of the record, including complete transcripts of the state court criminal and juvenile court trials. *See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 724 (10th Cir. 1993); *Andrews*, 943 F.2d at 1170. For the reasons discussed more fully below, the Court finds that the pertinent factual findings made by Judge Argo are reasonable ones, fully supported by the evidence, and sufficient to permit disposition of petitioner's remaining claims without taking any more evidence or revisiting Judge Argo's credibility choices.

Concerning the merits of Judge Argo's ultimate conclusion that petitioner is not entitled to relief, the parties agree on the appropriate standard of decision by the Court. Petitioner must establish that the state court's rejection of his claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the

Supreme Court." 28 U.S.C. § 2254(d)(1). Relief may be granted, therefore, if "the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; decided the case differently than the Supreme Court has on a set of materially indistinguishable facts; or unreasonably applied the governing legal principle to the fact of [petitioner's] case." *Elliot v. Williams*, 248 F.3d 1205, 1207 (10th Cir.), *cert. denied*, 122 S. Ct. 286 (2001). Under the "unreasonable application" clause, the test is one of objective reasonableness. Williams v. Taylor, 529 U.S. 362, 413 (2000).

Although the state court's adjudication of the claims at issue is a summary one, federal courts "owe deference to the state court's result, even if its reasoning is not expressly stated." *Aycox*, 196 F.3d at 1177. Under this rule, "it [is] left to the federal courts to articulate an appropriate rationale for the OCCA's summary decision." *Willingham v. Mullin*, 296 F.3d 917, 925 (10th Cir. 2002). "[W]e will uphold the Oklahoma appellate court's result . . . if our independent review persuades us the decision was not contrary to or an unreasonable application of clearly established federal law, or based upon an unreasonable determination of the facts in light of the evidence presented." *Hawkins v. Mullin*, 291 F.3d 658, 674 (10th Cir. 2002) (quoting *Walker v. Gibson*, 228 F.3d 1217, 1241 (10th Cir. 2000), *cert. denied*, 533 U.S. 933 (2001)); *Aycox*, 196 F.3d at 1178. Since petitioner did not receive a hearing in state court on his claims, however, any implicit factual findings of the state court are not entitled to deference. *Mayes*, 210 F.3d at 1289.

CONFLICT OF INTEREST

Petitioner claims that Mr. Tedder had a conflict of interest arising from his law practice that adversely affected his representation of petitioner. Specifically petitioner alleges that Mr. Tedder was in a law form with Laura's attorney, that petitioner and Laura had conflicting interests at the time of his state court trial, and that this conflict affected Mr. Tedder's decision whether to call Laura as a witness. This claim first surfaced on direct appeal; it was not raised at trial. The two-part analysis *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980), applies to a conflict of interest claim that was not raised at trial. *See Mickens v. Taylor*, 122S. Ct. 1237, 1243-44 (2002); *United States v. Alvarez*, 137 F.3d at 1251-52. "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client. Id., at 1252; *Bryan v. Gibson*, 276 F.3d 1163, 1173 (10th Cir. 2001). "[T]o demonstrate an actual conflict of interest, the petitioner must be able to point to specific instances in the record which suggest an impairment or compromise of his interests for the benefit of another party." *Alvaraz*, 137 F.3d at1252 (quoting *Danner v. United States*, 820 F.2d 1166, 1170 (11th Cir. 1987)); *United States v. Martin*, 965 F.2d 839, 842 (10th Cir. 1992). An attorney's performance is adversely affected by a conflict of interest "if a specific and seemingly valid or genuine defense strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or his own personal interests." *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990).

Much of the evidence presented at the evidentiary hearing before Judge Argo went to the issue of whether Messrs, Tedder and Kite were members of a "law firm" such that the rule of implied disqualification should apply. To prevail, however, petitioner must show "that

counsel actively represented conflicting interests." *Burger v. Kemp*, 483 U.S. 776, 783 (1987); *Bryan*, 276 F.3d at 1172. Application of an ethical rule imputing representation of a firm's clients to all lawyers in the firm is insufficient alone to meet this burden. *See United States v. Gallegos*, 39 F.3d 276, 278-79 (10th Cir. 1994) (violation of disciplinary rule does not establish actual conflict). Judge Argo did not decide this issue but instead assumed that the two lawyers might have belonged to a "firm." (3/28/02 Report and Recom. At 16). The Court agrees with this approach and similarly finds it necessary to address this issue.

Joint representation of two parties by an attorney creates a potential conflict of interest but, by itself, does not establish an actual conflict. *Burger*, 483 U.S. at 783. "A conflict does not arise unless "the interests of [the third party] and defendant [are] divergent in the current litigation, such that the [third party] has an interest in the outcome of the particular case at issue that is adverse to that of the defendant." *Bryan v. Gibson*, 276 F.3d at 1175 (quoting *Hale v. Gibson*, 227 F.3d 1289, 1313 (10th Cir. 2000), cert. denied, 533 U.S. 957 (2001)). Thus petitioner must show that both he and Laura had adverse or at least inconsistent interests in the criminal case and that Mr. Tedder was, in that case, advancing her interests detrimentally to him. This he has failed to do. Although they were co-defendants in the juvenile proceedings, Laura was not charged criminally and there is no suggestion that she had any real exposure to a criminal charge. While she was a potential witness who cooperated first with Mr. Tedder and then with the prosecution, there has been no showing that this change of alliance gave her any stake in the outcome of the

case.[31] As neither a party, a witness, nor a victim, Laura did not take any legal position in petitioner's criminal case.

No evidence suggests that Mr. Tedder's decision whether to call Laura as a witness presented a choice between two divergent interests. The existing record fails to support petitioner's arguments that Laura wished to see him convicted in order to gain an advantage in the juvenile proceeding and that using Laura as a defense witness might have jeopardized her alignment with the State for purposes of that proceeding. No evidence was presented about the status of the juvenile matter during the criminal case, aside from testimony at the hearing that Laura was complying with a treatment plan. The record shows, however, and petitioner admits, that if Laura had been called by Mr. Tedder at trial, the primary benefit to him would have been that her previous testimony in juvenile court could have been admitted for impeachment purposes to corroborate the "alibi" aspect of his defense. (Hr'g Tr. At 12-15, 20-23, 27, 51, 54-55.) The record contains no evidence that Mr. Kite was actively representing Laura at the time of the criminal trial, although he was still her counsel of record in the juvenile case. The evidence presented does not support a finding that Mr. Tedder's practice relationship with Mr. Kite provided him with confidential information about Laura, access to Mr. Kite's files, or any sense of loyalty to Laura. In short, petitioner has not shown that an actual conflict of interest existed.

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[31] The extent of Laura's cooperation with the prosecution is unknown. The record contains no testimony by Laura, either as a live witness or by affidavit, in any state or federal proceeding other than juvenile court. The evidence suggests that Laura's change of attitude was a personal one that came from believing her daughter and developing animosity toward her husband.

Assume for the purpose of argument, however, that a conflict of interest did exist by virtue of dual representation of Laura and petitioner.[32] Petitioner has not shown that he was adversely affected by any conflict. After a careful review of the entire record, including the state court transcripts and the evidence received at the evidentiary hearing in this case, the Court finds that Mr. Tedder did not compromise petitioner's defense due to his relationship with Mr. Kite or Laura, nor did Mr. Tedder make any tactical or other decision in his representation of petitioner to benefit Laura. As discussed below regarding the ineffective assistance claim based on the decision not to call Laura as a witness. Mr. Tedder's decision not to utilize Laura's testimony was reasonable under the circumstances and was not influenced by any adverse interest she had in the matter, by any confidential information he had about her, by any relationship he or Mr. Kite had with her. Given her attitude by the time of the trial, calling her would have been a dangerous decision, as is developed below. The Court concludes that, on this record, petitioner has failed to demonstrate that the alleged conflict of interest had any adverse effect on his trial counsel's performance or on his trial.

For these reasons, petitioner is not entitled to relief on his claim of ineffective assistance of counsel based on a conflict of interest that adversely affected his trial representation. Therefore, the Oklahoma Court of Criminal Appeals' rejection of this claim involved neither

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[32] The Court recognizes that this is a close question. Laura's cooperation with the prosecution in the criminal case and the possibility that she might have benefited in juvenile proceedings by helping the State to convict her husband poses a conflict that could easily cross the line from "potential" to "actual."

an unreasonable application of federal law nor an unreasonable determination of facts.

FAILURE TO CALL A WITNESS

Petitioner also claims that he received ineffective assistance of counsel at trial due to Mr. Tedder's failure to call Laura as a witness. To prevail on this claim, he must satisfy the familiar standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), by showing that his counsel's performance was constitutionally deficient and that the deficiency was prejudicial. Counsel's performance is deficient under Strickland if it "falls below an objective standard of reasonableness," and prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 690, 694. A reasonable probability means one "sufficient to undermine confidence in the outcome." *Id.* at 694. Here, petitioner has not satisfied either prong of *Strickland*.

The Court find from the record presented that Mr. Tedder's decision not to call Laura as a defense witness was a calculated one that was eminently reasonable under the circumstances. First, the record refutes the testimony of petitioner and his witnesses at the evidentiary hearing that the decision was made unexpectedly on the eve or in the middle of trial. The state court record supports Mr. Tedder's explanation that he referred during jury selection and his opening statement to Laura's possible testimony because he anticipated that the prosecutor would call her during the State's case. It also explains the recollection of petitioner's witnesses that they were surprised to learn that she would not be called. Contrary to petitioner's

testimony that Mr. Tedder changed his mind overnight about calling Laura after leading petitioner and his family to believe that she would be called as the last witness for the defense (Hr'g Tr. At 28-30), the state trial transcript reveals the Mr. Tedder rested the defense at the close of a trial day immediately after concluding Ms. Edmond's testimony. (Jury Trial Tr. At 748.) It was the prosecutor, when asked about rebuttal, who indicated that he intended to use Laura as a rebuttal witness (Jury Trial Tr. At 748-49), so the judge recessed the trial until the following day because her testimony was expected to be lengthy (Jury Trial Tr. At 749-50). When the trial reconvened the next day, however, the case proceeded directly to closing arguments (Jury Trial Tr. At 755), indicating that the prosecutor decided during the recess not to call Laura.

Second, the record fully supports Mr. Tedder's testimony that he decided not to use Laura as a witness because the potential harm that she would cause petitioner's defense far outweighed any potential benefit to be gained from her testimony. (Hr'g Tr. At 221.) Despite how petitioner wished to characterize the testimony given in the juvenile court trial, the record shows the factual information contained in that testimony was limited and provided little support for his defense. Wendy did not provide sufficient detail about the alleged instances of sexual intercourse during the criminal trial to render very useful Laura's prior testimony that one reason she disbelieved Wendy was because petitioner was incapable after the shooting injury of "climbing on top of her." (Juvenile Tr. at 208-09, 224.) Also, Laura testified that she had sexual intercourse with petitioner after his injury. (Juvenile Tr. at 224.) Moreover, petitioner admitted during his cross-examination at trial that he was incapable of sexual relations only for a few months

immediately following the shooting. (Jury Trial Tr. at 726-27.) Petitioner also testified at trial that he saw Wendy at least monthly during the period of alleged abuse and they were sometimes alone. (Jury Trial Tr. at 697-98.) Thus, petitioner's "alibi" was not a primary focus of his defense.

In short, the Court fully concurs in Judge Argo's conclusions that Mr. Tedder's "decision not to present Laura as a defense witness was sound trial strategy, and was not unreasonable given Laura's probable hostile attitude." (3/28/02 Report & Recom. At 19.) Accordingly, petitioner has failed to demonstrate any deficiency in trial counsel's performance.

Further. Although Judge Argo found no need to address the prejudice prong of the ineffective assistance claim, the Court considered this issue as well and concludes that petitioner was not prejudiced by Mr. Tedder's decision. In view of the limited value of Laura's testimony, it is extremely unlikely that failing to call her as a witness negatively affected petitioner's case. In fact, the opposite is true. If Laura had been called, her testimony against petitioner could have been very damaging. Her testimony concerning the allegations of sexual abuse during the juvenile case largely concerned her disbelief of her daughter. This circumstances had changed by the time of trial, when she was "extremely angry" at petitioner. (Hr'g Tr. at 184.) On this record, the Court finds no reasonable probability that Mr. Tedder's failure to call Laura as a witness created a less favorable outcome in the case.

For these reasons, petitioner has failed to establish his ineffective assistance claim arising from Mr. Tedder's decision not to call Laura as a defense witness. Therefore,

the Oklahoma Court of Criminal Appeal' reasonably rejected this claim.

CONCLUSION

For all of these reasons, the Court overrules petitioner's objections and adopts the Report and Recommendation of March 28, 2002. Judge Argo's ruling on a motion by petitioner (3/2802 Report & Recom. At 4 n. 5) is adopted without objection by respondent. Thus petitioner's Motion to Supplement Record with Relevant Telephone Directory Listings (Doc. No. 81) is granted. Petitioner's motion for Consideration of Pro Se Objections and Pro Se Complaint (Doc. No. 96) is **GRANTED**; Petitioner's Motion for Order Allowing Oral Argument (Doc. No. 95) is **DENIED**. His pro se motions to deem confessed his complaint against Larry Tedder, for an order to obtain records from the Oklahoma Administrative Office of the Courts, and for a judicial ruling (Docket Nos. 102, 103 & 104) are **DENIED** as moot.

WAYNE ALLEY
United States District Judge